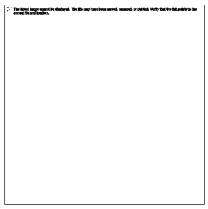
Message

From: Wintrob, Paul [Wintrob.Paul@epa.gov]
Sent: 12/18/2020 3:00:38 PM
To: R1 NewsClips [R1_NewsClips@epa.gov]
Subject: Inside EPA for Friday, December 18, 2020

Print/Online News

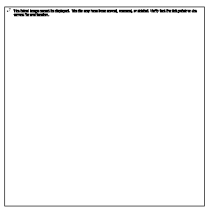


IN SETBACK FOR REFINERS, EPA FIGHTS HIGH COURT REVIEW OF RFS WAIVER RULING

Inside EPA | 12/18/2020 (7 hours, 58 minutes ago)

Posted December 10, 2020 In a setback for refiners, ***EPA*** *is opposing the industry's request for the Supreme Court to review an...*

Share: 

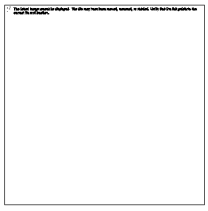


EPA EXPANDS RISK FINDINGS THAT MUST BE REGULATED IN FINAL PERC EVALUATION

Inside EPA | 12/18/2020 (7 hours, 58 minutes ago)

Posted December 15, 2020 ***EPA****'s just-released final evaluation of the common solvent perchloroethylene (perc or PCE) expands the...*

Share: 

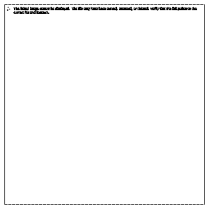


TRUMP EPA AIMS TO SHIELD AIR COST-BENEFIT RULE FROM BIDEN, HILL ATTACKS

Inside EPA | 12/18/2020 (7 hours, 58 minutes ago)

*Posted December 9, 2020 The Trump **EPA** is making several legal and political arguments in an effort to shield its newly finalized...*

Share: 

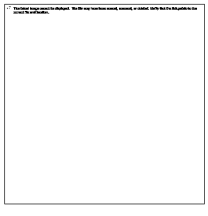


AMID TRANSITION TO BIDEN ADMINISTRATION, EPA FLOATS SEVERAL NEW RULES

Inside EPA | 12/18/2020 (7 hours, 58 minutes ago)

*Posted December 9, 2020 **EPA** is announcing ambitious rulemaking plans that would make it more difficult for the incoming Biden...*

Share: 



FORMER EPA WASTE CHIEFS SUGGEST BOOSTING SUPERFUND FINANCIAL STABILITY

Inside EPA | 12/18/2020 (7 hours, 58 minutes ago)

*Posted December 9, 2020 Two former **EPA** waste office chiefs in Democratic administrations say the incoming Biden administration...*

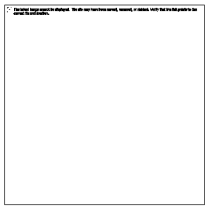
Share:

EPA DRAFT GUIDE FINDS SCORES OF ARTICLES SUBJECT TO PFAS SNUR

Inside EPA | 12/18/2020 (7 hours, 58 minutes ago)

Posted December 10, 2020 ***EPA*** *is seeking comment on a long-awaited draft guide that finds a range of articles, including apparel,...*

Share:

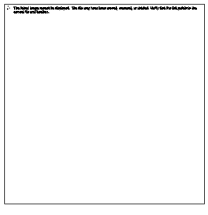


WHEELER MEMO TOUTING WESTERN OFFICE MODEL MIGHT LIMIT BIDEN'S OPTIONS

Inside EPA | 12/18/2020 (7 hours, 59 minutes ago)

Posted December 15, 2020 ***EPA*** *Administrator Andrew Wheeler in a new memo is touting the western agency mountains office that he...*

Share:



EPA SEEKS MORE INPUT ON COAL ASH REUSE FOR FUTURE WASTE REGULATION

Inside EPA | 12/18/2020 (7 hours, 58 minutes ago)

Posted December 9, 2020 ***EPA*** *is starting a new round of public comment on its planned overhaul of how its coal ash disposal rules...*

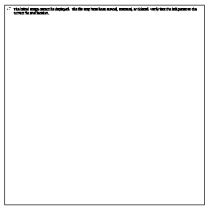
Share:

EPA SCRAMBLES TO PUBLISH DEREGULATORY RULES BEFORE TRUMP TERM ENDS

Inside EPA | 12/18/2020 (7 hours, 58 minutes ago)

*Posted December 14, 2020 Trump **EPA** officials are scrambling to complete work on a handful of major deregulatory measures in the...*

Share:

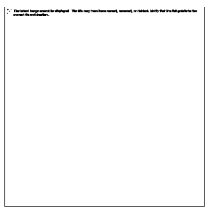


CAAAC WEIGHS HURDLES FOR AMBITIOUS BIDEN EPA CLIMATE CHANGE POLICIES

Inside EPA | 12/18/2020 (7 hours, 59 minutes ago)

*Posted December 10, 2020 Members of **EPA**'s Clean Air Act Advisory Committee (CAAAC) are weighing potential hurdles facing the...*

Share:



BIDEN APPEARS TO SHIFT AWAY FROM CALIFORNIA'S NICHOLS AS EPA CHIEF

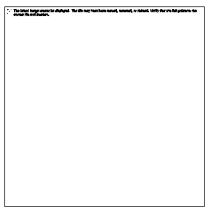
Inside EPA | 12/18/2020 (7 hours, 58 minutes ago)

*...retiring California Air Resources Board (CARB) chief Mary Nichols as his **EPA** administrator nominee following opposition from...*

SPLIT 8TH CIRCUIT RULING TEES UP FIGHT OVER STATES' DEFERENCE ON EPA LAWS

Inside EPA | 12/18/2020 (7 hours, 58 minutes ago)

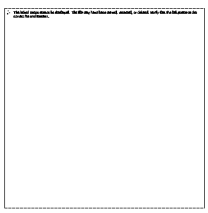
*...ruling upholding North Dakota's interpretation of the Clean Air Act and **EPA** air rules adds to ongoing debates over judicial...*



MCTEER TONEY SUGGESTS BIDEN QUICKLY STAY SUITS OVER TRUMP EPA RULES

Inside EPA | 12/18/2020 (7 hours, 58 minutes ago)

*Posted December 11, 2020 Heather McTeer Toney, a former Obama **EPA** regional official said to be in the running to lead the agency...*



WHEELER TOUTS WEST VIRGINIA'S FORTHCOMING ACE COMPLIANCE STRATEGY

Inside EPA | 12/18/2020 (7 hours, 58 minutes ago)

Posted December 11, 2020 ***EPA*** *Administrator Andrew Wheeler is applauding West Virginia and potentially other states for beginning to...*

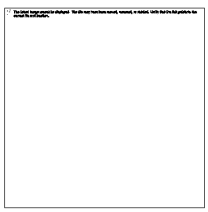
Share:

ECONOMISTS URGE BIDEN TO 'CORRECT' FLAWS IN TRUMP WOTUS RULE ANALYSIS

Inside EPA | 12/18/2020 (7 hours, 58 minutes ago)

..."correct structural weaknesses in this rule as well as other important ***EPA*** *policies," JR DeShazo, who directs the University of...*

Share:

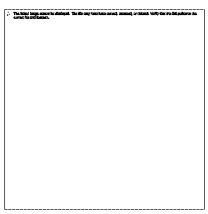


U.S. ASKS SUPREME COURT TO REJECT GUAM CERCLA CONTRIBUTION CHALLENGE

Inside EPA | 12/18/2020 (7 hours, 59 minutes ago)

... Gregory Wall, an attorney with Hunton Andrews Kurth after serving at ***EPA*** *as a senior attorney on Superfund enforcement cases,...*

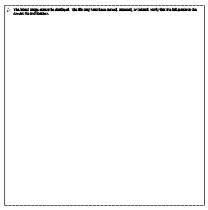
Share:



BIDEN OFFICIALS SIGNAL 'HUMILITY' IN RE-ENTERING GLOBAL CLIMATE DISCUSSIONS

Inside EPA | 12/18/2020 (7 hours, 58 minutes ago)

*...of the World Resource Institute's (WRI) climate initiative, tells Inside **EPA** Dec. 9 that the U.S. "can't come back and assume a...*



IN SETBACK FOR REFINERS, EPA FIGHTS HIGH COURT REVIEW OF RFS WAIVER RULING

Inside EPA | 12/18/2020

Posted December 10, 2020

In a setback for refiners, ***EPA*** is opposing the industry's request for the Supreme Court to review an appellate ruling that effectively precludes the agency's issuance of renewable fuel standard (RFS) compliance waivers to small refining companies, saying that a lower court should first resolve a legal fight over the RFS waiver policy.

The Department of Justice (DOJ) on ***EPA***'s behalf in a Dec. 8 brief filed in the high court case Hollyfrontier Cheyenne, et al. v. Renewable Fuels Association (RFA), et al, argued that the justices should not grant review of the U.S. Court of Appeals for the 10th Circuit's landmark decision in RFA v. ***EPA***, in which the regional court found that the agency cannot "extend" economic hardship waivers for refiners that lacked them in prior years.

DOJ says, "The question whether the ***EPA***'s exemption authority extends to these circumstances . . . does not warrant further review at this time."

The agency's position is a loss for refiners seeking issuance of dozens more waivers, but a win for biofuels groups that argue the waivers undermine the RFS.

EPA Administrator Andrew Wheeler has said that all litigation on the waiver issue should play out before the agency grants or denies more waivers, effectively punting final decisions to the incoming Biden administration.

Under the RFS, refiners processing up to 75,000 barrels of oil per day can qualify for a waiver if they can demonstrate "disproportionate economic hardship" from their compliance obligations. The Trump administration issued the waivers in much larger numbers than the Obama administration did, but biofuels groups blame the exemptions for "destroying demand" for biofuels.

The 10th Circuit's decision, denying the waiver requests of three small refiners, effectively precludes almost all small refiners from winning waivers, because few if any can demonstrate an unbroken line of waivers stretching back to 2011. ***EPA*** has already rejected efforts by refiners to win "gap filling" waivers for long-passed RFS compliance years that would have circumvented the 10th Circuit ruling, spurring a fresh wave of legal challenges by refiners in appeals courts across the country.

DOJ's Supreme Court brief says the case "does not meet this Court's ordinary criteria for granting certiorari. The decision does not conflict with any decision of this Court or another court of appeals. Indeed, the question presented was one of first impression in the court of appeals and has never previously been addressed by any other court."

The department notes that the District of Columbia Circuit is currently hearing several related challenges from

refiners and biofuels groups addressing the waivers question. "The question presented in the petition is currently before the D.C. Circuit in other pending litigation, and this Court will be better positioned to assess whether the issue warrants its review after that case is decided."

DOJ says ***EPA*** does not now take a stance against the 10th Circuit's interpretation of the RFS statute, established under the Clean Air Act, but rather says the regional court's interpretation does not violate any "core principle[] of statutory interpretation" and does not "warrant the Court's intervention at this time."

DOJ says, "Petitioners are correct that the word 'extend' can mean 'to make available,' . . . as in extending a job offer or extending credit. Petitioners are also correct that other courts of appeals have recognized that alternative connotation of 'extend' or 'extension' in construing other statutes. . . . But no other court of appeals has yet addressed the meaning of the term 'extension' as used specifically" in the RFS waiver context.

Also, DOJ notes that the 10th Circuit in RFA remanded ***EPA***'s grant of the three waivers on other grounds as well, faulting the agency's evaluation of the plants' economic health based on "industrywide" conditions, and finding that the agency "had acted arbitrarily and capriciously in failing to explain or acknowledge an apparent change in position with respect to whether these kinds of small refineries pass on to others the refineries' costs of purchasing" RFS compliance credits. Yet refiners do not raise these issues in their petition for high court review.

Biofuels groups led by RFA welcomed ***EPA***'s position in the high court case. "We agree with the well-reasoned position of the Justice Department and concur that no further review of the Tenth Circuit decision is warranted. The Tenth Circuit got it right when it concluded that the temporary small refinery exemptions Congress provided could not be extended if they had previously expired," the groups said Dec. 9. Ongoing RFS Litigation

RFA and its allies Growth Energy, National Biodiesel Board (NBB) and others filed their opening brief Dec. 7 in the D.C. Circuit suit RFA, et al. v. ***EPA***, challenging ***EPA***'s 2019 decision to exempt 31 small refiners from RFS compliance mandates for 2018, saying the waivers are at odds with the 10th Circuit ruling.

While the decision applies only in the 10th Circuit states of Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming, if applied nationally it would hinder issuance of future waivers.

"***EPA*** exceeded its authority by granting new exemptions to refineries when the statute authorizes only '[e]xtension of exemption.' As a unanimous Tenth Circuit panel confirmed earlier this year, the only small refineries that are "eligible for extensions [are] ones that submitted meritorious hardship petitions each [prior] year," the groups say.

"Because only seven small refineries still held exemptions as of 2015, at least [24] of the [31] small refinery exemptions ***EPA*** granted for 2018 had to be invalid," the groups say.

Further, "***EPA*** acted in an arbitrary and capricious manner and contrary to law by issuing the 2018 [small refinery exemption] Decision without any reasoned analysis of the hardships alleged by the individual refineries and instead blindly adopting" Department of Energy (DOE) recommendations. "***EPA*** must form its own analysis based on the evidence before it and accounting for important aspects of the problem; it did not."

"***EPA*** also acted irrationally by failing to reconcile its findings of disproportionate economic hardship with its longstanding position that refineries of all sizes are able to recoup the costs of RFS compliance in the sales prices of their products," the groups say. "***EPA*** exceeded its authority and acted in an arbitrary and capricious manner in fully exempting refineries for which DOE had recommended only partial exemption. Contrary to ***EPA***'s assertion -- which it subsequently abandoned -- the Clean Air Act does not foreclose partial exemptions."

The groups also reiterate prior claims that ***EPA*** can only grant the waivers prospectively, and not for past compliance years. "***EPA*** exceeded its authority by granting six exemption petitions that were submitted after the compliance year at issue. Under the Clean Air Act and ***EPA***'s own regulations, ***EPA*** had no power to grant those petitions. The small refinery program is expressly designed for refineries to petition prospectively," they say. Waiver Denial Challenge

Meanwhile, small refiners Sinclair Wyoming Refining Company and Big West Oil filed their joint opening brief Dec. 7 in their separate but related D.C. Circuit suit Sinclair Wyoming Refining Company and Big West Oil, LLC, v. ***EPA***, which challenges ***EPA***'s 2019 denial of their waiver requests for the 2018 compliance year. ***EPA*** issued the denials in the same document in which it granted the 31 waivers contested by biofuels groups.

The brief takes a much narrower approach to the waivers issue, focusing on issues specific to the companies' waiver requests. The companies also have parallel litigation in the 10th Circuit, as like many refiners they argue that waiver decisions should be decided in the regional appeals courts, and not in the D.C. Circuit as ***EPA***

argues.

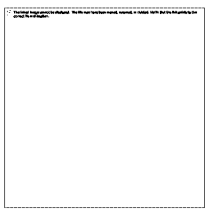
"***EPA***'s denials were based on the fact that the parent companies of the small refineries in this case had other lines of business beyond refining. As this Court has held, however, 'the pertinent statutory text requires ***EPA*** to consider whether the small refinery itself faces disproportionate economic hardship,'" the companies say.

They cite the D.C. Circuit's 2015 RFS waiver decision in Hermes Consol., LLC v. ***EPA***. In that case, the court found ***EPA*** was justified in not taking into account the tax obligations of the parent company of a small refiner seeking a waiver, although the court vacated and remanded ***EPA***'s denial of the waiver on other grounds.

"[E]ven if it were permissible for ***EPA*** to consider other lines of business owned by a refinery's parent company, this approach represents a dramatic change in ***EPA*** policy and practice -- a change that ***EPA*** neither acknowledges nor explains," they say, adding that failure to explain the rationale renders the waiver denials unlawful. "***EPA*** and DOE ignored evidence in the record that would have resulted in exemptions for both refineries. Sinclair submitted detailed information regarding the markets in which it competes -- markets that DOE and ***EPA*** recognize are highly competitive. Yet there is nothing in the record to suggest that ***EPA*** or DOE even considered this information," the refiners add.

Finally, the refiners echo an argument made by biofuels groups over the adequacy of ***EPA***'s decisions on waivers. "***EPA*** makes no pretense of having done anything other than follow DOE's Recommendations, even though courts and ***EPA*** itself have acknowledged that the Agency has an obligation to consider other economic factors beyond those addressed in the DOE Study" of refiners' economic positions, the refiners say. -- Stuart Parker (sparker@iwpnews.com)

Return to Top



EPA EXPANDS RISK FINDINGS THAT MUST BE REGULATED IN FINAL PERC EVALUATION

Inside EPA | 12/18/2020

Posted December 15, 2020

EPA's just-released final evaluation of the common solvent perchloroethylene (perc or PCE) expands the number of evaluated uses the agency had initially proposed as posing unreasonable risks that must be regulated despite declining calls from advisors and environmentalists to consider risks to the general population and those from legacy uses.

EPA Dec. 14 released its final Toxic Substances Control Act (TSCA) evaluation of perc, concluding that 59 of 61 evaluated conditions of use pose unreasonable risks to workers, consumers or bystanders. The evaluation finds no unreasonable risks to the environment.

The final perc evaluation -- the sixth of the first batch of 10 the agency plans to complete before the end of the year -- finds "unreasonable risks to workers and occupational non-users (ONUs) when domestically manufacturing or importing the chemical; processing the chemical for a variety of uses; and when used in a variety of industrial and commercial applications," ***EPA***'s non-technical summary states.

"This also includes unreasonable risks to consumers from all consumer uses, and when exposed to dry cleaned articles, and to bystanders for most consumer uses."

These risks were associated with health effects including "neurotoxicity from acute exposures and neurotoxicity,

kidney, liver, and immune, and developmental effects, and liver cancer from chronic exposures."

The specific uses associated with these risks "include domestic manufacturing and import; processing as a reactant or intermediate and incorporation into a formulation, mixture or reaction product; repackaging and recycling; a variety of industrial and commercial uses, including several types of degreasing uses, lubricants, adhesives, paints and coatings, automotive care products, metal and stone polishes, welding, textile processing, use in wood furniture manufacturing, foundry application, use by Department of Defense for oil analysis and water pipe repair, and various dry cleaning-related uses; and all consumer uses including exposure to dry cleaned articles."

In reaching these findings, ***EPA*** finds more uses present unreasonable risk than it did in its draft perc evaluation, released last April for peer review and public comment. The draft evaluation identified eight uses that it deemed not to present unreasonable risk.

The final evaluation narrows those uses that do not require regulation to just two: distribution in commerce and "industrial and commercial use in lubricants and greases as solvent for penetrating lubricants and cutting tool coolants."

But ***EPA*** did not agree to concerns from science advisors who peer reviewed the draft evaluation last summer and environmentalists who argued that the agency needed to include legacy uses of perc in the evaluation and consider general population risks, such as ambient air exposure to perc releases from dry cleaning facilities that use the chemical. Legacy Uses

In its final report issued last August, ***EPA***'s Science Advisory Committee on Chemicals (SACC) urged the agency to evaluate risks of legacy uses of perc, joining similar calls from environmentalists. "Though releases of PCE from these legacy uses occurred in the past, exposures from these uses are ongoing and will influence both human and environmental risk now and in the future," the SACC said.

But ***EPA*** argues that there are no legacy uses of perc that require evaluation.

In its response to comments document, the agency references the U.S. Court of Appeals for the 9th Circuit's November 2019 decision in Safer Chemicals, Healthy Families v. ***EPA*** that reviewed ***EPA***'s risk evaluation rule, one of a handful of framework-implementing rules the Trump ***EPA*** finalized after Congress rewrote TSCA in 2016. The court ruled that ***EPA***'s risk evaluation rule unlawfully allowed the agency to exclude legacy uses from its evaluations, leading ***EPA*** to consider legacy uses for asbestos, another of the first 10 existing chemicals it chose to evaluate following the 2016 reform.

But for perc, "***EPA*** did not identify any 'legacy uses' (i.e., circumstances associated with activities that do not reflect ongoing or prospective manufacturing, processing, or distribution) or 'associated disposal' (i.e., future disposal from legacy uses) of PCE, as those terms are described in ***EPA***'s Risk Evaluation Rule, 82 FR 33726, 33729 (July 20, 2017)," the agency states in its response document.

"Therefore, no such uses or disposals were added to the scope of the risk evaluation for PCE following the issuance of the opinion in Safer Chemicals, Healthy Families v. ***EPA***, 943 F.3d 397 (9th Cir. 2019). ***EPA*** did not evaluate 'legacy disposal' (i.e., disposals that have already occurred) in the risk evaluation, because legacy disposal is not a 'condition of use' under Safer Chemicals."

EPA also held its ground in its argument that it does not need to evaluate general population exposures and risks in the perc evaluation because those exposures are already addressed by other rules and statutes -- a general, controversial policy the Trump ***EPA*** has held throughout its first evaluations despite calls from SACC to review general population exposures.

"General population exposures to PCE may occur from industrial and/or commercial uses; industrial releases to air, water or land; and other conditions of use," the agency said.

But it noted that during the course of the risk evaluation process, Office of Pollution Prevention and Toxics (OPPT) staff worked closely with other ***EPA*** offices that regulate the chemicals' releases under other major environmental statutes.

"Through this intra-agency coordination, ***EPA*** determined that PCE exposures to the general population via surface water, drinking water, ambient air and sediment pathways fall under the jurisdiction of other environmental statutes administered by ***EPA***," ***EPA*** states in the final evaluation.

The agency argued that it is "both reasonable and prudent to tailor TSCA risk evaluations when other ***EPA***

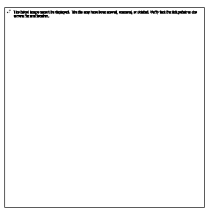
offices have expertise and experience to address specific environmental media, rather than attempt to evaluate and regulate potential exposures and risks from those media under TSCA."

"***EPA*** believes that coordinated action on exposure pathways and risks addressed by other ***EPA***-administered statutes and regulatory programs is consistent with statutory text and legislative history, particularly as they pertain to TSCA's function as a 'gap-filling' statute, and also furthers ***EPA*** aims to efficiently use Agency resources, avoid duplicating efforts taken pursuant to other Agency programs, and meet the statutory deadline for completing risk evaluations," the document states.

EPA added that it did not evaluate hazards or exposures to the general population, "and as such the unreasonable risk determinations for relevant conditions of use do not account for exposures to the general population."

SACC, in its August report, "unanimously recommended that inhalation and dermal consumer exposures should be aggregated, and that consideration should be given to incorporation of general population exposures. This would likely increase total exposure by all routes." -- Maria Hegstad (mhegstad@iwpnews.com)

Return to Top



TRUMP EPA AIMS TO SHIELD AIR COST-BENEFIT RULE FROM BIDEN, HILL ATTACKS

Inside EPA | 12/18/2020

Posted December 9, 2020

The Trump ***EPA*** is making several legal and political arguments in an effort to shield its newly finalized rule rewriting Clean Air Act cost-benefit review procedures from reversal by the incoming Biden administration or Capitol Hill, including that the rule is procedural and thus exempt from the Congressional Review Act (CRA).

In another defensive maneuver, ***EPA*** is declaring that the rule will take effect immediately upon being published in the Federal Register. That could make it tougher for the Biden ***EPA*** to quickly undo the rule, and it echoes a tactic the agency used in its decision not to strengthen particulate matter (PM) air standards, also completed this week.

EPA Administrator Andrew Wheeler is touting the regulation as an accomplishment that will provide a first-of-a-kind legally enforceable requirement to conduct specific cost-benefit analysis procedures and disclose related assumptions, including separate calculation of the rules' "co-benefits" beyond the pollution directly targeted by a regulation.

"It creates a cause of action so the public can hold us accountable to ensure that we are following the regulation," Wheeler said during a Dec. 9 event held by the conservative Heritage Foundation to publicly unveil the rule. "The cost-benefit analysis must be done . . . under the guidelines we put in the regulation."

The Dec. 9 rule is one of several high-profile deregulatory measures the agency has been racing to complete before the end of the Trump administration's single term.

Perhaps mindful of possible attempts by the next administration or Congress to attack the rule, ***EPA*** in the final measure includes language in an effort to shield it from potential repeal efforts under the CRA.

"This rule is exempt from the CRA because it is a rule of agency organization, procedure, or practice that does

not substantially affect the rights or obligations of non-agency parties," the rule states.

The final rule also includes provisions justifying its immediate effective date for the rule, without which the package could be subject to immediate pullback by Biden officials given the typical lag times between when final rules are announced, published in the Federal Register, and legally take effect.

"As a rule of Agency procedure, this rule is exempt from the notice-and-comment and delayed effective date requirements set forth in the Administrative Procedure Act," the rule states.

Richard Revesz, director of the Institute for Policy Integrity at New York University, tells Inside ***EPA*** the agency's assertions with respect to the rule's effective date and CRA exemption are "unusual" given the notice-and-comment process for the regulation.

"That is unusual given the magnitude of this rule, given the impact of the rule," he says.

He also predicts the rule "is going to be looked at very carefully for the ways in which it can be undone," with that effort likely to be a Biden administration priority.

The move to deem the rule in effect immediately echoes the agency's strategy for the PM rule, with the Trump administration short on time to get various measures on the books.

Multiple press reports have indicated that ***EPA*** is operating under the goal of completing its work on final rules by Dec. 15, in order to make it more likely they get them published in the Register before Biden is inaugurated.

In this vein, Wheeler acknowledged that the agency's science "transparency" rule has not yet been issued but said he hoped that it would be "unveiled in a couple of weeks." He added that "we actually are narrowing it a little bit more" than what the agency has proposed to make sure it will not exclude "important science for regulations in the future." Political Attacks

EPA is also retaining its argument that it has authority to issue the cost-benefit rule under section 301 of the Clean Air Act, which is general authority that the ***EPA*** administrator has to carry out official responsibilities.

The rule text says this includes "internal Agency procedures that increase the Agency's ability to provide consistency and transparency to the public in regard to the rulemaking process under" the air law, though environmentalists have claimed the section is too vague to justify the agency's cost-benefit regulation.

Any effort by the incoming Biden administration to reverse the measure could run into administrative and political considerations, and Wheeler during the Heritage event appeared to preview attacks by backers of the rule against future repeal efforts.

"I suppose a future administration could try to do away with this regulation . . . which I think would be rather ironic for anyone to step in and say we are going to do a regulatory process to take transparency away from the American public," he said.

The final rule is broadly similar to the proposal ***EPA*** issued earlier this year with three main elements: a requirement for a "benefit-cost analysis" for future rules, development of that analysis according to "best practices" from the engineering, physical and biological sciences; and the mandate for separate reporting of co-benefits, according to an ***EPA*** summary.

The final version, however, includes several changes, such as provisions requiring separate calculation of domestic and international air pollution benefits; embracing a "systematic review" to inform health effects included in cost-benefit reviews; and calling for future ***EPA*** guidance on retrospective analysis of past rules.

"We do call for a guidance to be issued by the agency in the future to take a look at how past regulations were developed, to help guide us for future regulations," Wheeler said.

But he said this provision is "not retroactive" and is not a means to scuttle past regulations. It also appears to fall short of some industry calls for the rule to require retrospective analysis of future rules.

The final cost-benefit measure also requires quantified health effects of pollution to be based on a "clear causal or likely causal" relationship between pollutant exposure and effect.

Further, ***EPA*** in the final rule also clarifies that "for human health endpoints, a systematic review process must be used to evaluate the hazard data for the purposes of determining which endpoints to include" in a cost-benefit

review. The agency says the move embraces the Science Advisory Board's call for such a review of the scientific literature, for the purposes of determining what health effects to include in the cost-benefit analysis. Co-Benefits Attacks

The Trump ***EPA*** prioritized the air cost-benefit measure, and Wheeler had pledged to issue similar cost-benefit rewrites for multiple environmental statutes, in the event of a second Trump administration term.

The policy has been a flashpoint for controversy over claims by industry and the Trump ***EPA*** that prior ***EPA*** rules -- including the Obama-era mercury and air toxics standards (MATS) -- improperly relied on co-benefits to make the rule's benefits exceed costs.

The final regulation echoes the proposal in that it does not explicitly require the agency to disregard co-benefits when setting its rules, and it also does not require that rules pass a cost-benefit test.

"The costs could outweigh the benefits . . . all we are doing is requiring an accounting of both the costs and benefits to be made public," Wheeler said.

But Wheeler also reiterated the longstanding industry critique of co-benefits during the Heritage event, calling MATS the "poster child" for such strategies.

His remarks touting the enforceability of the cost-benefit rule also appear to confirm critics' concerns that the real goal of the measure is to provide a roadmap for industries to file suit over the adequacy of ***EPA***'s cost-benefit reviews.

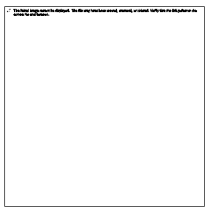
"This is a way of throwing sand in the gears" for future regulations, former ***EPA*** Director of Economic Analysis Roy Gamse, a member of the ***EPA*** alumni group Environmental Protection Network, tells Inside ***EPA***. For industry that means, "I can come and sue ***EPA*** because it did not do a cost-benefit analysis to my satisfaction."

But Wheeler argues that the rule at least in theory creates a cause of action for environmental groups and not just industry.

"If a trade association or, say, the [Natural Resources Defense Council], is not satisfied with the cost-benefit analysis in a future rulemaking, they will be able to take that to court and that will be an actionable item," he said.

Revesz argues that the rule is an example of regulatory "asymmetry" under which the Trump ***EPA*** has been "prioritizing costs and belittling benefits," with the rule making it easier for indirect benefits of rules to be ignored. "It is like separate but equal. Separate but equal is not equal," he says. -- Doug Obey (dobey@iwpnews.com)

Return to Top



AMID TRANSITION TO BIDEN ADMINISTRATION, EPA FLOATS SEVERAL NEW RULES

Inside EPA | 12/18/2020

Posted December 9, 2020

EPA is announcing ambitious rulemaking plans that would make it more difficult for the incoming Biden administration to write stringent regulations across a host of programs, floating an updated policy agenda that details the Trump agency's bid to complete several major deregulatory efforts before the new administration.

However, the ultimate fate of many of the new rulemakings could face significant questions given that President-elect Joe Biden's incoming administration appears poised to take a much more aggressive stance on climate and environmental rules, and given Biden's criticisms of Trump ***EPA*** rule rollbacks. As such, the new rulemaking agenda includes several planned policies that the agency might never finalize.

Despite those expectations, ***EPA*** in its Fall 2020 Unified Agenda, released Dec. 9, formally rolled out several new rulemakings, including efforts to replicate its controversial science "transparency" policy and cost-benefit analysis measure through statute-specific rules.

The plans formalize pre-election statements from Administrator Andrew Wheeler, who said crafting statute-specific science and cost-benefit policies would be key elements of his agenda for a potential second term for President Donald Trump.

While the agency publicly unveiled its final cost-benefit rule for Clean Air Act policies also on Dec. 9, the updated Unified Agenda envisions similar rules for four additional statutes: the Clean Water Act (CWA), the Safe Drinking Water Act (SDWA), the Resource Conservation & Recovery Act, and the Federal Insecticide, Fungicide, and Rodenticide Act.

The agenda sets varying regulatory milestones for each of those measures, including proposed rules starting in June 2021. It also suggests ***EPA*** might issue an advance notice of proposed rulemaking (ANPR) for the SDWA cost-benefit rule as soon as this month, while Trump officials were planning a similar ANPR for the CWA in February.

Similarly, ***EPA*** is floating a pair of new rulemakings to develop science "transparency" standards for various statutes, which would likely align with its forthcoming agency-wide rule on that issue that Trump officials are hoping to finalize by the end of December.

Specifically, the agency says it planned to issue an ANPR on science transparency for the CWA and SDWA in May, along with a proposed rule for similar issues under the Clean Air Act in September.

Environmentalists and other Trump ***EPA*** critics have sharply attacked both the cost-benefit and science rules, arguing they are intended to make it more difficult for a future administration to develop a technical justification for strict new regulations.

As such, the incoming Biden administration is expected to try to reverse such policies, and likely would not continue integrating them into additional agency programs. Pending Policies

Elsewhere in the updated regulatory agenda, Trump officials said they planned to float an ANPR in June on whether ***EPA*** and the Transportation Department should reconsider aspects of their greenhouse gas and fuel efficiency standards for heavy trucks.

The agency is also planning to issue a proposed rule in March to tighten nitrogen oxide standards for heavy trucks, and is suggesting the rule could be completed a year afterward.

EPA's agenda also envisions issuing a proposal in September to reconsider several aspects of Obama-era methane standards for landfills, and to finalize that measure a year later, in September 2022. Trump officials previously extended several key deadlines under the Obama rules, though environmentalists and states are challenging that action in appellate court.

While the agency is moving ahead on multiple rules, officials appear to be stalling on a long-delayed draft proposal declaring biomass energy to be carbon neutral for Clean Air Act permitting. That measure is dubbed a "long-term action" for which no milestones are envisioned over the next year, and the agency now does not have any particular timeline for the effort.

Further, a controversial proposal launched under former Trump ***EPA*** chief Scott Pruitt easing standards for so-called "glider" trucks is now omitted from the Unified Agenda entirely, and ***EPA***'s plan to revisit GHG standards for truck-trailers remains a long-term action with no specific timeline for issuance.

Outside of air and climate policy, the agenda says ***EPA*** plans to issue by the end of December an ANPR for CWA effluent limits on releases of per- and polyfluoroalkyl substances (PFAS) from facilities that manufacture plastics, organic chemicals and synthetic fibers. The agency previously raised the possibility of such a rule in a 2019 draft plan but had taken no public steps to craft one, and the Biden administration is likely to face wide-ranging pressure to set strict limits on the closely watched chemicals.

Another newly announced CWA rule would formalize ***EPA***'s reading of the Supreme Court's decision in County of Maui v. Hawaii Wildlife Fund that exposed some groundwater pollution to CWA permit limits. The agency is planning an August ANPR to follow its recently proposed draft guidance on applying the ruling. While environmentalists have opposed the substance of the guide, an ongoing rulemaking process could provide the Biden ***EPA*** with a vehicle to advance its own interpretation. -- Lee Logan (llogan@iwpnews.com) & David LaRoss (dlaross@iwpnews.com)

Return to Top

FORMER EPA WASTE CHIEFS SUGGEST BOOSTING SUPERFUND FINANCIAL STABILITY

Inside EPA | 12/18/2020

Posted December 9, 2020

Two former ***EPA*** waste office chiefs in Democratic administrations say the incoming Biden administration should boost the Superfund program's decades-long flat budget and write new financial assurance rules to address the program's financial limits, while predicting the Biden ***EPA*** will emphasize climate adaptation in cleanups.

Tim Fields, the former assistant administrator for ***EPA***'s waste office during the Clinton administration and now senior vice president at MDB, Inc., said funding for the Superfund program has been problematic for a number of years, spanning administrations, impacting the program's ability to start new cleanups, complete cleanups and send resources to aid states on cleanups.

During a Dec. 8 webcast on "Superfund at 40," Fields said he hopes that the incoming administration has "an ability or a desire" to restore funding to the Superfund program at a high level "because I think the lack of adequate funding does hinder the ability of the Superfund program to have all the staff they need, implement all the priorities they want and facilitate getting sites cleaned up and reused at the same time."

The webcast, titled "The Future of Superfund: Has the Mission Expanded, and Will It Be Permanent?", was sponsored by the Environmental Law Institute and Beveridge & Diamond law firm. It also featured Mathy Stanislaus, assistant administrator for the waste office during the Obama administration, and current Assistant Administrator for the Office of Land & Emergency Management (OLEM) Peter Wright.

Fields suggested having a "broader discussion about funding contaminated sites in this country." He said there should an overall discussion going into the new year on what amount "we're willing to spend on addressing these contaminated sites across the country, not just funding, but enforcement activities and financial assurance. All those issues need to be part of the equation and they need to be talked about in the context of other environmental priorities as well, like climate change and other issues that are coming to the fore in a big way."

Fields said there should be a discussion on what level of priority various cleanup programs should have relative to each other. He pointed out that besides the Superfund program, which over the past two decades generally received $1 billion annually for cleanups, the Energy Department (DOE) also receives about $7 billion annually for its nuclear waste cleanups and the Defense Department (DOD) is appropriated about $700 million each year. The discussion should be about the relative priority of each of these, deciding what the government will do with resources it allocates to Superfund, versus corrective action Resource Conservation & Recovery Act (RCRA) sites, versus DOE sites and DOD sites, he said.

Stanislaus also advocated for budget boosts to Superfund, but also pushed for shoring up the financial stability of the program by revisiting Superfund financial assurance rules that the Trump ***EPA*** has declared are

unnecessary.

Stanislaus, now the interim director for the World Economic Forum's Global Battery Alliance, noted that significant resources states had put toward cleanups dried up during the recession that the Obama administration faced at the beginning of its term, which meant a "huge rise" in the number of sites that formerly would have been covered by state cleanup programs that instead saw funding disappear.

He added that there are now fewer champions at the federal and state levels for funding cleanups, and there has been a cumulative loss of funds. He said the public and federal and state leaders share the responsibility for examining the importance of investing in cleanups, as funding is inadequate.

He also pointed out that some construction starts for cleanups cannot begin due to a lack of resources -- underscoring that cleanup delays have an impact as research has linked increased health issues to delayed cleanups.

Earlier this year, it was revealed that ***EPA*** had quietly updated its website to show data indicating its backlog in funding new construction work at Superfund sites had grown to its highest level yet, now at 34 unfunded construction starts in FY19, prompting backlash from Democratic lawmakers. Financial Assurance

Stanislaus also advocated for the creation of financial assurance requirements under the Superfund law's section 108(b) while noting he disagrees with the Trump ***EPA***'s recent decision not to require such assurance for a number of industry sectors.

With regard to orphan Superfund sites -- where ***EPA*** and states must foot the bill because no potentially responsible party is available to address such sites -- Stanislaus argued that "the lack of financial assurance is a crucial part of it." He added that "financial assurance is part and parcel of the Superfund program, but people delink it."

"I strongly believe we need to have an equally vigilant focus on financial assurance during operations of businesses as much as we need to have an adequately funded Superfund program." He said he would argue that financial assurance "drives better performance by companies so that they do not have the contamination."

Moderator Steven Jawetz, an attorney with Beveridge & Diamond, asked the panel why extensive financial assurance requirements under the RCRA program have not really addressed the issue of recent failures leading to much new cleanup work.

Wright replied that the RCRA financial assurance requirements apply to interim status-permitted facilities, predominately treatment, storage and disposal facilities, which are a small percentage of businesses in the United States. While the requirements apply to those that are in the hazardous waste management business, there are many sites that handle hazardous substances that are not subject to RCRA financial assurance requirements, he said.

Stanislaus added that RCRA's financial assurance requirements have been found to be "wanting" in a number of circumstances, citing, for instance, the auto recovery situation where he said financial assurance was inadequate. He also noted that leading businesses are now committing to environmental, social and governance criteria, driving more accountability. Climate Adaptation

Asked whether they believe the Biden administration will stay the course on the Superfund program or set a new direction, Stanislaus said he believes the Biden ***EPA*** will stress climate adaptation in the program as well as environmental justice/community leadership issues. He suggested potentially continuing opportunities begun in the Obama administration to site clean energy infrastructure on large sites that have ongoing remedies.

Fields expects to see the new administration work with Congress to attempt to boost the budget for the Superfund program and likely advocate for reforms to the program -- as new administrations tend to do -- to make it more efficient and less costly. He agreed with Stanislaus on climate change and environmental justice measures likely being a focus in the Superfund program as well.

Wright said with the new administration, he hopes there will be a continuing recognition of the Superfund, RCRA and brownfields programs having a real impact on communities, with the knowledge that speed is important. He also advocated for maintaining the Trump ***EPA***'s LEAN management tools.

On climate impacts on Superfund sites, Wright remarked that damage from the large number of significant natural disasters the past four years has not resulted in major impediments to Superfund remedies, crediting ***EPA*** career staff for their approval of remedies withstanding such impacts.

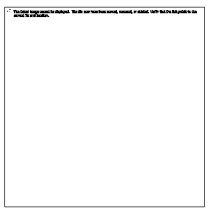
Jawetz responded that it sounds as if ***EPA*** will not have to reopen remedies under five-year reviews to build in more resilience to climate change, asking Wright if the agency had pursued any such efforts to counter potential vulnerability to natural disasters.

Wright said the agency has looked at the matter during five-year reviews of remedies, but he knows of no sites that required his attention.

Stanislaus though suggested the issue be given a close look, starting with Alaskan sites, where DOD at its sites appears to have relied on permafrost as a permanent barrier to contamination migration. He said he believes there should be a comprehensive re-look at all of those sites because the permafrost is fracturing. It is unclear at this point whether those fractures are at the point where they are resulting in exposure pathways directly to humans or indirect releases to water sources, he said.

He suggested the possibility of a dedicated program to look at sites lying over permafrost and near waterways. He conceded it is a funding issue, but said more data is needed to examine this question and make an informed decision on whether in-place remedies "are holding up." -- Suzanne Yohannan (syohannan@iwpnews.com)

Return to Top



EPA DRAFT GUIDE FINDS SCORES OF ARTICLES SUBJECT TO PFAS SNUR

Inside EPA | 12/18/2020

Posted December 10, 2020

EPA is seeking comment on a long-awaited draft guide that finds a range of articles, including apparel, vehicle parts, carpets, solar panels and others, are subject to its July 2020 significant new use rule (SNUR) on certain per- and polyfluoroalkyl substances (PFAS) because they include regulated chemicals in their "surface coatings."

"This guidance provides additional clarity for stakeholders that are importers of articles that may contain long-chain PFAS as part of a surface coating," the agency said in a Dec. 10 press release.

The draft guidance, issued Dec. 10, is intended to clarify applicability of the SNUR, which governs long-chain perfluoroalkyl carboxylates (LCPFAC), a subgroup of PFAS chemicals widely used in consumer, commercial and other products.

EPA toxics chief Alex Dunn said recently she expected the draft version of the guidance to be issued for comment this month.

The Obama administration first initiated the rulemaking in 2015 as part of an effort to prevent the use of so-called dead chemicals that are no longer in use or are being phased out by their manufacturers, often as a result of agreements with ***EPA***.

As such, the rule would require manufacturers, importers and others to notify the agency should they seek to resume using the substances, manufacture items containing the chemicals or import articles that contain them, so the agency can determine whether their renewed uses pose "unreasonable risks" that must be regulated.

While the measure languished after the Obama administration left office, the Trump ***EPA*** resumed work on it after Congress set deadlines for a final version in the fiscal year 2020 defense authorization act.

According to Larry Culleen, a partner with the Arnold & Porter law firm, while the Obama ***EPA*** proposed to

require notification for the import of LCPFAC in all articles, the Trump administration generally narrowed the requirement in its March 2020 supplemental proposal to apply only to long-chain PFAS included in the "surface coating" on articles.

While industry groups had urged the agency to provide a definition of "surface coating," ***EPA*** said in the rule's preamble that it is "not defining this term due to the many ways that LCPFAC chemical substances could be applied to an article as part of a surface coating and how a given article could move through the supply chain from manufacture to disposal. ***EPA*** believes that this approach ensures that ***EPA*** will have the opportunity to conduct a detailed consideration of potential exposures related to these uses when there is a specific condition of use to review." Two Criteria

As a result, ***EPA*** says in the draft guidance that it considers a "surface coating" to be subject to the SNUR if it meets one of two criteria: coating on any surface of an article that is in direct contact with humans or the environment during the article's normal use or reuse, whether the coating is oriented towards the interior or exterior of the article; or coating on any internal component, even if facing the interior of the article, if that component is in contact with humans or the environment during the article's normal use or reuse.

The agency provides as an example the hypothetical case of a luggage importer working with a foreign manufacturer to create water and stain-resistant fabric luggage, and choosing one of three coatings, all of which contain an LCPFAC substance and subject to various requirements laid out by the SNUR, depending on which subcategory they fall under.

But the draft guidance also provides a "non-exhaustive list" of a range of other articles that could potentially be regulated under the rule as they "may use LCPFAC chemical substances as part of a surface coating on the article."

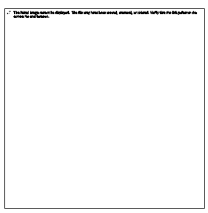
This includes apparel, outdoor equipment, automotive parts, carpets, furniture, electronic components, light bulbs, solar panels, paper goods, luggage, and construction materials.

However, ***EPA*** writes, "products such as paints, lubricants, and fire-fighting foam are not articles," as this definition is dependent on the product being applied to an article.

"Paint on a car is considered as part of an article, but paint in a can is not an article under TSCA," the agency's compliance guide says. "Additionally, a lubricant applied to an article would be considered as part of an article."

EPA will accept comment on this guidance for thirty days after it is published in the Federal Register. -- Diana DiGangi (ddigangi@iwpnews.com)

Return to Top



WHEELER MEMO TOUTING WESTERN OFFICE MODEL MIGHT LIMIT BIDEN'S OPTIONS

Inside EPA | 12/18/2020

Posted December 15, 2020

EPA Administrator Andrew Wheeler in a new memo is touting the western agency mountains office that he created as a model for eliminating "silos" of disparate programs within ***EPA*** in order to bolster environmental protection, but one observer says the memo's scope might limit any bid by President-elect Joe Biden to scrap the office.

In a Dec. 2 memo obtained by Inside ***EPA***, Wheeler indicates he is pushing ahead with plans announced in September to create a new western office aimed at speeding cleanups of former hardrock mining sites.

However, the agency chief also suggests the office could broaden its scope to address other regional issues. And he describes how the division will lead various tasks while coordinating with other offices at headquarters and in the regions, and also be required to concur on any significant hardrock mining cleanup decisions.

"The creation of this new office demonstrates how the ***EPA*** is thinking outside the box with creative solutions to local problems, reevaluating how we manage projects and workflow, so that we can achieve efficient and effective environmental cleanup," Wheeler writes in the memo, addressed to top agency officials. "This office stands as an example of removing silos within the agency to promote collaboration internally."

But former ***EPA*** regional official Nat Miullo cautions that if the incoming Biden administration wants to reverse the creation of the office, the memo could make it much harder to achieve that goal -- particularly if the Trump ***EPA*** has already made significant personnel decisions including relocating employees to staff the division.

It is unclear when the new office, to be located in Lakewood, CO, will be fully staffed, and an agency spokesperson did not respond to a request for comment by press time.

Wheeler sent the memo to ***EPA*** Associate Deputy Administrator Doug Benevento, Acting General Counsel David Fotouhi, Chief of Staff Mandy Gunasekara, the Office of the Chief Financial Officer, assistant administrators, and the regional administrators that head the agency's 10 regions around the country.

Wheeler also says that the agency "recognizes that a one-size-fits-all approach to environmental remediation is not effective and inhibits the agency's ability" to meet its environmental protection mission.

"Implementing geographic-specific solutions to environmental challenges and fostering partnerships with states, tribes, local communities and other stakeholders will improve the ***EPA***'s ability to respond to the range of special issues and unique needs associated with these distinct ecosystems that have lingered for far too long," he says.

But Miullo, a retired ***EPA*** advisor to western regional administrators on Good Samaritan and mining site cleanups, cautions that aspects of the memo are written broadly. Miullo tells Inside ***EPA*** that this could give the administration the ability to pursue a broader interpretation that could affect more than just mining sites -- noting even the name of the office -- Office of Mountains, Deserts and Plains (OMDP) -- is "wide open" to interpretation.

He notes that the original Trump transition team of 2016 wanted to eliminate ***EPA***, raising concern over trusting that the Trump ***EPA*** administration -- which has just over a month left in office -- will limit this only to mining issues. Lack Of Transparency

Further, Miullo cites the lack of transparency in the memo, the lack of any cost-benefit analysis showing that the shift would prove beneficial and a lack of congressional support. Sen. Tom Udall (D-NM) and Rep. Betty McCollum (D-NM) earlier this year criticized ***EPA*** for undertaking the shift without congressional input, asking ***EPA*** to halt implementation of the plan until congressional appropriators approved it.

At the conclusion of the memo, the administrator also alludes to potentially wider responsibilities for OMDP in the future. "[I]t is my expectation that OMDP will make significant and dramatic improvements in our cleanup efforts at all these western hardrock mine sites. When successful, OMDP will serve as a model and may be asked to address other regional issues that impact the western United States," he says.

For the Biden ***EPA***, Miullo notes it is much easier to reverse changes made only on paper, versus pulling staff back from relocations if they have already been assigned to OMDP.

Miullo notes that various offices work on mining cleanup sites -- not just Superfund personnel, but also staff in the water, enforcement and policy offices, given that such cleanups require significant resources. He adds that Wheeler's memo does not make clear what level of resources ***EPA*** is dedicating to the new office.

And given the number of higher priority issues likely to be on the Biden ***EPA***'s agenda, it might not be able to undo the office immediately even if that is a goal, he says.

OMDP will report directly to the Office of Land & Emergency Management at ***EPA*** headquarters, and is focused on expediting cleanup of abandoned uranium mines on the Navajo Nation, streamlining so-called Good Samaritan cleanups at hardrock mining sites, using Lean management system principles in mining cleanups, and identifying advanced technology solutions for hardrock mining sites. OMDP's Operations

The memo describes how OMDP will implement Lean into its own operations and implement parallel efforts in Regions 6,7,8,9 and 10 for hardrock mining sites in those regions. The office will also collaborate with regional offices to develop cleanup and reuse plans and timelines for cleanups, and it will concur on significant mining cleanup decisions.

Further, Wheeler calls for various offices to revise and amend a memorandum of agreement with the Navajo Nation and various ***EPA*** regions to add in the role of OMDP. The new office is also to coordinate with the agency's tribal office on cleanup of abandoned mines on tribal lands.

The office also will work with the Office of Research and Development to initiate a stakeholder dialogue with others on identifying innovative technologies and approaches to more cost-effectively clean up contaminated Superfund and hardrock mining sites, Wheeler says.

He also calls for coordination with the Office of Water and congressional, public engagement and policy offices. Further, OMDP will be the lead program for reviewing requests for Good Samaritan cleanups, he says. -- Suzanne Yohannan (syohannan@iwpnews.com)

Return to Top

EPA SEEKS MORE INPUT ON COAL ASH REUSE FOR FUTURE WASTE REGULATION

Inside EPA | 12/18/2020

Posted December 9, 2020

EPA is starting a new round of public comment on its planned overhaul of how its coal ash disposal rules treat reuse of the waste including as a fill material as well as a component of products like wallboard, after floating revisions to its ash reuse policy in 2019 that drew attacks from industry and environmentalists.

The agency on Dec. 9 signed a notice of data availability compiling a broad swath of public input on ash reuse, including comments on the 2019 proposal, stakeholder meetings officials conducted during summer 2020 and ***EPA***'s own information-gathering.

It asks for public input both on that material, and potential approaches the agency could take to gather yet more data on ash disposal and reuse. The material is intended to inform a reworked proposal that would address both what uses of the waste to consider as "beneficial reuse," and storage of ash -- also termed coal combustion residuals (CCR) -- in "piles" intended for future use.

"In sum, by this action, ***EPA*** is providing public notice of information the Agency received in response to the initial comment period for the August 2019 proposed rule, providing notice of information that ***EPA*** obtained after the close of the initial comment period from stakeholder meetings, and accepting additional data and information that the public has that may help inform the reconsideration of the beneficial use definition and provisions for CCR accumulations destined for beneficial use or disposal," the notice says.

Comments will be due 60 days after the notice appears in the Federal Register, meaning any binding reuse policy will be up to the incoming Biden ***EPA***, which could opt to abandon some or all of the Trump administration's in-progress rulemakings -- such as its recent proposal to approve Texas' ash permit program.

The 2019 rule would have created a unified set of standards for ash "piles" regardless of whether they were

intended for disposal or reuse, rather than the approach established in the broader 2015 ash disposal rule that limits piles based on their purpose and mass, with more stringent restrictions on piles of at least 12,400 tons.

But both industry groups and environmentalists opposed it as unlawful, though for mutually exclusive reasons -- environmental groups argued the new policy would greatly loosen restrictions on piles, while officials from several industry sectors said it would instead be so strict as to all but eliminate reuse.

Environmentalists have urged the incoming administration to undo a host of Trump-era ash rulemakings they say unlawfully weakened disposal standards first enacted in 2015, but some observers say the agency might instead use guidance and enforcement discretion to tighten how the policies are applied rather than going through a fresh regulatory process.

The new administration could also halt work on several still-pending rules that ***EPA***'s latest unified agenda, released Dec. 9, indicates it does not plan to finish before Inauguration Day on Jan. 20. Those include the Texas program approval but also regulations for a nationwide permit program and regulations governing "legacy" sites located at closed power plants. Future Policy

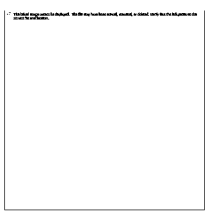
In its notice, ***EPA*** says it is still developing a new approach to regulating reuse, including a change to the 12,400-ton threshold for regulation that several industry groups have argued is based on a mathematical error. But it adds that the process is not yet at the point where officials can say for certain that any particular element of the data it has gathered and released so far will inform an eventual proposal.

"***EPA*** is still in the process of evaluating information contained in the docket for this document as potentially relevant to the two issues that the Agency is reconsidering -- the beneficial use definition and provisions for CCR accumulations destined for beneficial use or disposal. Therefore, ***EPA*** cannot definitively state whether this information will provide support in the reconsideration of the beneficial use definition or the provisions for CCR accumulations or that the Agency has determined that it is appropriate to rely on this information to inform the Agency's decision-making process on these issues," it says.

And it lists several factors and data categories it could draw on to further inform that work, including "any practices which provide for the staging and storage of CCR destined for beneficial use or disposal, onsite or offsite, including the accumulation size, duration and recurrence; designs related to placement and mounding of CCR; and practices related to dust control or minimization of releases to soil, groundwater and surface water."

Further, it says, "[d]ata about environmental releases from CCR accumulations of different size, duration, recurrence and practices to control releases to soil, groundwater and surface water may aid the Agency in identifying the measures sufficient to protect human health and the environment." -- David LaRoss (dlaross@iwpnews.com)

Return to Top



EPA SCRAMBLES TO PUBLISH DEREGULATORY RULES BEFORE TRUMP TERM ENDS

Inside EPA | 12/18/2020

Posted December 14, 2020

Trump ***EPA*** officials are scrambling to complete work on a handful of major deregulatory measures in the coming weeks amid a looming informal deadline to send final versions of rules to the Federal Register in time for them to be formally published before the incoming Biden administration takes office Jan. 20 and can quickly block them.

For example, ***EPA*** late last week submitted its long-delayed draft final rule to rewrite Obama-era greenhouse gas limits for new coal-fired power plants to the White House for interagency review.

The Office of Management & Budget (OMB) received the measure Dec. 11, giving officials a little more than a month to complete interagency review and submit it for publication to the Federal Register, though it is unclear whether the Register would have enough time to publish it.

The agency in an October court filing previewed the timeline, saying it would send the draft final update of the 2015 new source performance standards to OMB in "late fall" and take final action sometime during the "winter."

The proposed version of the rule, issued in December 2018, would remove a de facto carbon capture and sequestration (CCS) mandate and dramatically raise the allowable rate of carbon dioxide emissions by almost 60 percent for some new and modified coal plants.

It also proposed that the "best system of emission reduction" for new coal plants is the most efficient demonstrated steam cycle with best operating practices, not CCS.

Other major rules currently under OMB review that ***EPA*** is hoping to complete before the end of the Trump administration include: its controversial science "transparency" rule, a regulation declining to strengthen Obama-era ozone air quality standards, its long-pending update to drinking water lead and copper standards, and first-time GHG rules for aircraft.

OMB received the draft final ozone rule Dec. 8, and it received the draft final aircraft standards Dec. 2.

Interagency review has been ongoing for much longer for the science rule, which has been pending at OMB since September, and the lead and copper rule, which was sent to the White House at the end of July.

But even if ***EPA*** completes the regulatory text of those measures before Biden takes office next month, there is a good chance they might not be published in the Register before the new administration.

According to an internal agency email obtained by several news outlets, Dec. 15 is a "good deadline to target" to send prepublication final rules for formal publication, given that there are an increasing number of documents across the government being sent to the Register.

The Dec. 2 email from Mary Manibusan, an ***EPA*** division director, noted that given the number of documents expected to be sent to the Register in the coming weeks, "the majority of rules submitted after Dec. 15 will probably not publish before Jan. 20. It's likely that some will, but [the Register] has no way to know which subset of rules will get published until after they receive them," according to an E&E News story. Other Rules

In addition to the yet-to-be-completed rules, ***EPA*** is also hoping to publish a pair of major regulations ahead of the incoming Biden administration: a rule declining to strengthen Obama-era particulate matter (PM) air standards and an overhaul of cost-benefit analysis procedures for future Clean Air Act policies -- both of which were signed last week.

Inside ***EPA*** previously reported that for the ozone standard, ***EPA*** likely will declare the policy takes immediate effect upon publication in the Register, as it did with the PM rule and the cost-benefit rule.

But environmentalists are already attacking that move as legally questionable.

Administrator Andrew Wheeler said during a Dec. 9 event that the agency's science "transparency" rule has not yet been issued but said he hoped that it would be "unveiled in a couple of weeks."

He added that "we actually are narrowing it a little bit more" than what the agency has proposed to make sure it will not exclude "important science for regulations in the future."

The rule generally limits the types of scientific research that can be used for regulatory purposes, to the extent that underlying data is not public. Critics say this could limit the use of important health studies that rely on confidential health information.

Return to Top

CAAAC WEIGHS HURDLES FOR AMBITIOUS BIDEN EPA CLIMATE CHANGE POLICIES

Inside EPA | 12/18/2020

Posted December 10, 2020

Members of ***EPA***'s Clean Air Act Advisory Committee (CAAAC) are weighing potential hurdles facing the incoming Biden administration's ambitious climate change agenda, noting the divided Congress means the agency will be the main focus of climate policies but will also need to avoid regulatory overreach or inconsistent rulemakings.

Speaking on a Dec. 9 virtual meeting focused on drafting a report on the accomplishments and future challenges of ***EPA*** in the agency's 50th anniversary year, CAAAC members debated a broad array of air policy topics including climate and transportation, along with the conventional pollutant reduction benefits of cutting greenhouse gases.

CAAAC member and attorney Robert Wyman, with Latham and Watkins, noted that if the current balance of power in Congress remains the same, Congress may remain "relatively dysfunctional" in the climate legislation realm.

This will increase the impetus for the Biden administration to act by rulemaking or executive order, but Wyman said such efforts must be carefully considered in order to withstand legal scrutiny. Many observers believe that more-conservative courts, including the Supreme Court, mean agency efforts to enact sweeping new programs through existing Clean Air Act authority could face even greater legal headwinds than they did in the Obama administration.

Wyman urged the federal government to look across its various departments and agencies to look for the most legally-robust authorities for climate action. This could include elements outside of ***EPA***'s purview, such as "border adjustments" to ensure trade policies consider climate issues. He said that enhancing the agency's information-gathering tools on climate are "relatively bullet-proof, legally."

He also referenced air law section 115 as a possible tool. The provision is focused on international emissions and some argue it could be particularly well suited to climate change. Wyman's remarks appear to fit with a "whole of government" approach recently recommended by a group of over 150 environmental policy experts, including former government officials, known as Climate 21.

Within the overall government approach, Wyman said, "***EPA*** should lead, not follow."

CAAAC member Steve Flint, a longtime New York state air regulator, speaking in a personal capacity, noted the crossover between climate policy and reduction of conventional air pollution, and saw this is one way to reduce combustion of fossil fuels in order to curb both GHGs and "criteria" pollutants such as ozone.

Flint noted that ***EPA*** is unlikely to be able to greatly expand its GHG authorities because of the courts, but said that the states have ample legal authorities for climate initiatives and these will continue to play an important role.

Panel member Eric Massey, director of environmental, social and corporate governance policy and reporting with the electric utility Arizona Public Service, urged a consistent approach to air regulation in order to avoid "whiplash" that undermines the sector's planning. He foresaw a potential rush for GHG offsets in the coming years, depending on what policies the federal government and states adopt, and said this could present problems to ensure that offsets are genuine.

Massey also predicted possible conflicts between the need to further reduce GHGs and the need to meet national ambient air quality standards (NAAQS) for criteria pollutants such as nitrogen oxides. For example,

using hydrogen as a fuel source cuts GHG emissions, but increases NOx, with implications for local air quality, he said. Vehicle Policies

Attorney Robert Meyers, a former head of ***EPA***'s air office now with the law firm Crowell and Moring, raised the issue of lifecycle GHG analysis as vital to future climate policy, for example in how the agency considers the emissions impacts of electric vehicles (EVs) versus conventional vehicles.

In response, Wyman stressed the need for harmonized accounting protocols for lifecycle GHGs, in order to provide industry with regulatory uniformity and consistent policy across states.

Wyman also said it may now be time to "decouple" ***EPA***'s GHG standards for vehicles from the fuel economy standards set by the National Highway Traffic Safety Administration (NHTSA).

Various commentators have already suggested this approach, in the light of increasing sales of EVs that do not easily compare with gasoline or diesel-fueled vehicles.

Meyers noted that the switch to EVs, if that is the future transportation policy of states and the federal government, will not happen "overnight," and therefore ***EPA*** will have to grapple with duel fueling systems as legacy fossil-fueled vehicles linger in the national fleet.

Other observers have previously noted that maintaining the legacy infrastructure may become a hard sell for gas station owners if they are faced with steep bills to replace aging equipment, such as storage tanks, but also a declining portion of their sales from gasoline or diesel.

The rollout of electric charging infrastructure is also an area of intense debate, the panelists noted. Some argued that federal policy should be fuel-neutral and the government should not pick "winners and losers" in transportation policy.

But panelists also acknowledged the challenge of expanding charging infrastructure. For example, Texas-based consultant Clay Pope stressed the need for standardization and interoperability of charging equipment, and added that the private sector will be reluctant to install charging points to serve certain communities, such as lower-income households living in multi-family housing.

He further queried when ***EPA*** would stop pursuing tighter fuel economy regulations for conventional vehicles, and instead allow automakers to focus their efforts on building EVs that achieve zero or near-zero emissions. -- Stuart Parker (sparker@iwpnews.com)

Return to Top

BIDEN APPEARS TO SHIFT AWAY FROM CALIFORNIA'S NICHOLS AS EPA CHIEF

Inside EPA | 12/18/2020

Posted December 14, 2020

It appears increasingly likely that President-elect Joe Biden will not select retiring California Air Resources Board (CARB) chief Mary Nichols as his ***EPA*** administrator nominee following opposition from environmental justice (EJ) advocates, amid some indications he could announce his choice as soon as this week.

The New York Times reports that the Biden transition team is "scrambling to find someone else," after EJ groups'

criticisms including an early December letter spearheaded by California groups accused her of having a "bleak record in addressing environmental racism."

One source tracking the issue -- who defends Nichols as the most qualified for the job -- says it is not yet clear the decision is a "done deal."

But several press reports are flagging potential late-hour alternatives, including North Carolina environment secretary Michael Regan.

The Times also cites two other possible picks to be ***EPA*** administration who were previously rumored to be under consideration for separate Biden administration environment posts: Natural Resources Defense Council President Gina McCarthy, often cited as a potential candidate to be domestic climate "czar"; and New York University law professor Richard Revesz, who some have said could be a key official in the White House regulatory affairs office.

Inside ***EPA*** previously reported that Nichols was considered the front-runner for ***EPA*** chief, but that opposition was starting to build from some Republicans and EJ groups. The latter cited her backing of California's cap-and-trade program and an alleged spurning of EJ concerns.

The reports of Biden's movement away from Nichols comes with some predicting an announcement of environmental posts could come this week.

Talk of Regan, who is African-American, or Revesz, adds to other names that have circulated to be ***EPA*** chief, including former ***EPA*** Region 4 Administrator Heather McTeer Toney and former Delaware environment chief Collin O'Mara.

The Biden transition office did not immediately respond to a request for comment, but a second source tracking the issue tells Inside ***EPA*** that Biden's pick for ***EPA*** appears to be "not Nichols."

This source says it is also not clear that Toney would be the nominee, noting that her stint at ***EPA***'s Southeast regional office is not comparable with heading a state environment department or similar high-level job. She is currently a senior director with the advocacy group Moms Clean Air Force.

Regan's biography on the North Carolina Department of Environmental Quality (DEQ) website notes that he has been DEQ chief since early 2017, when Gov. Roy Cooper (D) took office. The agency's mission is to "protect North Carolina's environment and natural resources."

It also notes Regan has "more than 18 years of professional experience" focused on "environmental advocacy and regulation," including a stint with the Environmental Defense Fund (EDF), where he worked on climate and energy issues and was Southeast regional director.

Prior to that, he worked in ***EPA***'s Office of Air & Radiation in the Clinton and George W. Bush administrations on programs to reduce pollution, as well as market-based solutions to improve energy efficiency, air quality and climate-related challenges. Climate & EJ

North Carolina, however, has been less aggressive than Nichols' home base of California on climate change issues, which the first source argues makes Regan at least initially appear to be an odd choice for heading ***EPA*** when the agency is expected to be "at the center" of addressing climate issues. The source does not cite anything against Regan specifically.

One EJ advocate says that in addition to opposition to Nichols' nomination from EJ groups, the incoming administration was hearing from national groups like the NAACP about their disappointment in the overall diversity of Cabinet picks so far, "so that may play into it some."

However, the source says it would still be "surprising" if Nichols is out, given her track record.

The source knows Regan and calls him "super talented." There is no reason why Regan shouldn't win support from Black and EJ groups, the source says, but adds, "just because you are a person of color" does not translate to an automatic endorsement. Regan could face opposition for "the same thing that Mary evidently got hit on," which is lack of concern for EJ issues.

While at EDF, Regan worked on cap-and-trade policy, which many EJ groups oppose.

This source says whomever Biden picks, it is crucial that he choose "people who are passionate about these

issues and are willing to push because we are running out of time" to address both climate change and institutional racism.

If Biden's team is not aggressive enough, "they will lose young people who invested so much time" in getting them elected, the source warns. -- Doug Obey (dobey@iwpnews.com) & Dawn Reeves (dreeves@iwpnews.com)

Return to Top

SPLIT 8TH CIRCUIT RULING TEES UP FIGHT OVER STATES' DEFERENCE ON EPA LAWS

Inside EPA | 12/18/2020

Posted December 10, 2020

Legal experts say a federal appeals court ruling upholding North Dakota's interpretation of the Clean Air Act and ***EPA*** air rules adds to ongoing debates over judicial deference to states and federal agencies, and likely tees up future suits testing the extent to which judges will defer to states with delegated authority to implement ***EPA*** laws.

A three-judge panel of the U.S. Court of Appeals for the 8th Circuit in a 2-1 ruling in Casey Voigt, et al., v. Coyote Creek Mining Co., LLC issued Nov. 20 agreed with North Dakota air regulators they were correct to grant a coal mine and processing facility a "minor source" air permit under delegated Clean Air Act authority, instead of a tougher "major source" permit that local ranchers say is required to mitigate coal dust blowing from the facility.

But dissenting Judge David Stras, appointed by President Donald Trump, warned that to achieve this, the panel majority "unveiled" a new and unconstitutional form of judicial deference to state regulators over interpreting federal provisions such as the air law's programs establishing ***EPA*** permit requirements. He said that the court's majority opinion has manufactured a new form of deference, which he dubs Voigt deference.

"In my view, even if we must defer to a federal agency's interpretation of a federal statute . . . and a federal agency's interpretation of a federal regulation . . . it defies basic constitutional principles to defer to a state agency's interpretation of federal law," according to the dissent.

Stras added, "In the abstract, cooperative federalism makes sense," referring to the balance between states and the federal government. "It allows states to account for their own unique needs in implementing federal law. But when implementation spills over into interpretation, the calculus changes. At that point, state agencies should not have a special role -- much less a decisive one -- in telling us what a federal statute or regulation means."

Further, "The threat to the judiciary's interpretive power is once again right out in the open," according to the dissent. "Over the last century, the growth of the administrative state has chipped away at it, while judicial-deference doctrines have acquiesced in -- perhaps even -- encouraged -- this development, in a marked departure from both historical practice and the Framers' constitutional design."

Seth Jaffe, an environmental attorney with Foley Hoag, says the case is "very important. I see this as a live issue now," a question "teed up" for further litigation in future cases.

And a law professor says regardless of the specific arguments over deference to state agencies, the case fits into a broader discussion over courts' deference to executive agencies at the federal level under the Chevron and Auer doctrines. "The dissent by Judge Stras seems to be in line with the general trend of conservative judges wanting to give less and less deference to administrative agencies," the source says.

Conservative jurists have in recent years expressed increasing discomfort with Chevron and Auer, finding that courts have allowed executive agencies too much leeway to interpret ambiguous laws, the law professors say.

Under the Chevron doctrine, courts defer to federal agencies' permissible interpretation of statutes where the law is ambiguous or silent on a particular question. Under the Auer doctrine, courts defer to federal agencies' reasonable interpretations of their own regulations. Clean Air Act Delegation

The Voigt case differs somewhat because it relates to state authorities' ability to interpret federal statutes and regulations. Legal sources say that traditionally, courts do not defer to state authorities' interpretations in this way.

In a Clean Air Act context, ***EPA*** is understood to have veto power over state implementation plans (SIPs) to implement the air law, under a 2004 Supreme Court ruling in Alaska Department of Environmental Conservation (DEC) v. ***EPA***. The majority opinion in the Voigt ruling, authored by Judge Bobby Shepherd, appointed by former President George W. Bush, cites to the Alaska DEC opinion.

Shepherd in his opinion wrote, "As the primary body responsible for issuing permits based upon the [air law] standards, North Dakota is in the best position to decide whether a given facility falls within or satisfies the . . . standards, and that decision is entitled to deference."

Shepherd added, "Regarding the Voigts' assertion that giving deference to the [North Dakota] permitting decision undercuts the ***EPA***'s non-delegable authority to make legal determinations in order to preserve the uniformity and consistency of [new source performance standards, or NSPS] on a national level, the Voigts . . . ignore the cooperative framework where states are tasked with carrying out the [air law's] aims, which include making determinations regarding NSPS applicability."

But this express grant of deference surprises some legal experts. Jaffe notes that the facts of the Alaska DEC case were different, regarding the state's opposition to ***EPA***'s position on source-specific emissions controls. But in the Voigt case, the court defers to the state agency, without reference to ***EPA***. Jaffe says that ***EPA***, as the federal regulator, is best-placed to ensure consistent decision-making across states, even under cooperative federalism.

"You really don't want inconsistent decision-making on this," says Jaffe.

A second law professor says, "Courts are split on whether state agencies deserve Chevron or Auer deference when interpreting federal law, but the general rule is that no deference is due. I was not surprised at the outcome in the North Dakota case, but I was surprised that the 8th Circuit felt it necessary to grant the state agency deference."

The law professor continues, "I do think that the cooperative federalism model" of the Clean Air Act, and the Clean Water Act as well, "played a large part in the panel majority's decision. But I tend to agree with the dissent that such cooperation does not really address the fundamental problem of allowing 50 states to come up with their own interpterion of federal law. That could have been avoided by not granting deference but noting that the state's interpretation in this particular case, especially given that ***EPA*** did not disagree, was persuasive."

But a third law professor disagrees. "I think this is a specific result under the [air law]," rather than general issue of administrative law "as the dissent poses it. The [air act] gives the state agency powers under the Act, so it is not deference to a random state agency but to one with a specific statutory role in enforcing" the air law. Principle of Non-Delegation

Related to the deference doctrines is the principle of non-delegation, which holds that Congress should not delegate its authority to other entities such as federal agencies, absent a clearly stated "intelligible principle" laid down by the legislature for agencies to follow when regulating under federal statutes.

Now, with a 6-3 conservative majority on the Supreme Court favoring "originalist" or "textualist" interpretations of federal laws, both deference and non-delegation are likely to come into play. But as Stras' dissent in the Voigt case illustrates, this need not always favor pro-industry, anti-environmental outcomes, sources say.

Case Western Reserve University Professor Jonathan Adler, speaking to Inside ***EPA*** in September, made this point. "People have this [assumption] conservative justices will vote for the conservative outcome. No, they will vote for the conservative jurisprudential outcome, which is not always the conservative policy outcome."

Conversely, the incoming Biden administration is thought likely by many observers to rely heavily on executive

actions to curb climate change and deal with other environmental problems, especially if Democrats fail to win control of the Senate in January runoff elections in Georgia. This could leave new rules legally vulnerable if they rely too much on Chevron or Auer deference, or attempt sweeping new regulatory programs not explicitly called for by Congress.

Meanwhile, current ***EPA*** Administrator Andrew Wheeler in a Dec. 2 opinion piece in the Washington Times identifies a non-delegation problem. "Today, it is clear to us that Congress has ceded many of its powers and responsibilities to unelected bureaucrats in regulatory agencies."

Further, "In their persistent deference to agencies and 'expertise,' our legislators fail on two, opposite counts. On one hand, members of Congress enact statutes that allow regulators too much latitude, so that they may do what they want without guidance or, more importantly, accountability." Prescriptive Statutes

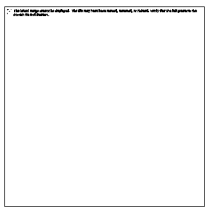
Yet Wheeler also acknowledges the opposite problem -- excessively prescriptive statutes that fail to adapt to changing circumstances. "On the other hand, legislators sometimes make laws that are excessively rigid and unable to tolerate adjustment as our scientific knowledge evolves and gives us new information."

Wheeler then singles out the Clean Air Act as an example, saying, "Since its amendment in 1990, our means of measuring pollution and health impacts have greatly improved. We can with much more precision and accuracy say what is in the air, how much of it is there, and how it interacts with the human body."

But "our judgment of how much is too much, and worth the cost of further reduction efforts, has not been similarly refined. Rather than fixing a standard of compliance, legislators ceded those policy decisions to the bureaucrats and regulators, allowing them to drive the rules beyond reason and with no regard to effects."

Environmental attorney Jaffe takes issue with Wheeler's argument, which in general appears to favor more-prescriptive legislation. An excessively rigid approach "is a disaster," Jaffe says, locking in specific terms that cannot be readily altered with changing circumstances. "That is all of Congress's worst statutes," he says. -- Stuart Parker (sparker@iwpnews.com)

Return to Top



MCTEER TONEY SUGGESTS BIDEN QUICKLY STAY SUITS OVER TRUMP EPA RULES

Inside EPA | 12/18/2020

Posted December 11, 2020

Heather McTeer Toney, a former Obama ***EPA*** regional official said to be in the running to lead the agency under President-elect Joe Biden, is urging Biden on day one to direct legal staff to seek court stays of any litigation over Trump agency rules, adding it will be "a heavy lift for everyone" to reverse them while prioritizing new actions.

During a Dec. 10 Facebook Live session, McTeer Toney also said that Biden on his first day in office should follow through on his plan to reenter the Paris climate accord from which President Donald Trump withdrew. She also advocated for implementing ***EPA*** strategies to promote environmental justice and addressing the needs of various communities.

Interviewed by Sen. Ben Cardin (D-MD), ranking member on the Environment & Public Works Committee's transportation panel, McTeer Toney was asked to name environmental actions Biden should take early on after his Jan. 20 inauguration that do not require congressional approval but show his priorities.

McTeer Toney, who is senior director of the advocacy group Moms Clean Air Force and the former administrator of ***EPA***'s Southeast Region 4 during the Obama administration, said after Biden takes office he should immediately direct legal teams to begin to seek stays in litigation on Trump rules "to just stop it" so that the new administration and ***EPA*** and other agencies can begin an assessment.

McTeer Toney is considered to be one of three finalists to lead ***EPA*** under Biden, with the other candidates being California's departing air chief Mary Nichols, and Collin O'Mara, a former Delaware regulator, who is also the current CEO of the National Wildlife Federation and a Biden adviser.

Before she went to ***EPA*** in 2014 to become Region 4 administrator, McTeer Toney was the youngest and first African-American woman elected to be mayor of Greenville, MS.

McTeer Toney also appeared unified with the incoming administration on environmental justice and climate issues, saying she was encouraged to hear the transition team and incoming administration talk about having environmental justice and justice run through every federal agency, "not just putting the onus on one particular agency," and ensuring that it is a "core value" throughout the administration.

She cited the dozens of rules that the Trump administration has rolled back, referring to Trump ***EPA*** rules reversing protections set by the Obama administration, and contended the reversals are disproportionately impacting communities of color. "And so we must reckon with this in the next administration," she said.

"I'm certainly hopeful that as they're talking about justice throughout every single agency, they're keeping in mind that these must be priority issues that are addressed, and that we have to put research, data and science resources to them to ensure that we correct it moving forward."

In particular, she said, "When we look at what are the holes, the gaps, I think immediately to the science gap," referencing efforts by the Trump administration that "truly decimated the science and the data that's needed to make necessary decisions" on health impacts.

The Biden administration will also be responsible for restoring trust in the federal government, she said, specifically "restoring the trust that we are relying on the science and we're making the best decisions on behalf of the American people." She said one thing the new administration cannot do is to "exclude the American public" from the rulemaking process -- something she argued the Trump administration did. 'A Mandate to Work on Climate'

On climate, McTeer Toney also spoke of the need for bold action on climate, which she said is reflected in the Biden climate policy plan. She cited young, progressive movements and voters who backed Biden's election and will be watching to see that remains a priority. She said that it is "very clear that the Biden-Harris administration got a mandate to work on climate as a result of the election."

Alluding to climate, environmental justice and clean energy, McTeer Toney said she believes "the first thing that has to be done is making sure they are really following up on those promises that were made throughout the election," because young, progressive movements that turned out young people to vote "are still watching and want to make sure this remains a top issue."

She added, "climate change is not just some far-off thing in the future; it impacts infrastructure, job development, job growth, and what we see in our communities every day."

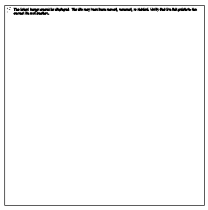
Biden's pick of former Secretary of State John Kerry to be his chief climate envoy with a seat on the National Security Council signals "we're going back to being number one" in international climate policy, McTeer Toney said. "It definitely says that the United States is serious about being a leader on climate and that we are interested in forging relationships with our friends," she said, noting Kerry's history of leadership on climate matters and his international and foreign policy record. Community Needs

She also cited the needs of communities, particularly when it comes to things like water infrastructure. She said she believes the Safe Drinking Water Act needs to be looked at as a serious justice issue, alluding to the Flint, MI, lead in drinking water crisis. She also noted that wastewater treatment requires infrastructure development and drinking water systems need upgrades, but cited the difficulties mayors and cash-strapped cities face in trying to make those happen with limited tax revenue. Just being able to comply with existing regulations, the mayors and cities across the country often have their hands tied and do not understand how the federal government is expecting them to achieve compliance when they lack the tools, she said.

She added that this is a good opportunity for the Biden-Harris administration to show it is here to help, to ensure

communities have access to clean water but also ensure they do not fall behind, and put them on a path to ensure resiliency to climate, infrastructure and jobs. -- Suzanne Yohannan (syohannan@iwpnews.com)

Return to Top



WHEELER TOUTS WEST VIRGINIA'S FORTHCOMING ACE COMPLIANCE STRATEGY

Inside EPA | 12/18/2020

Posted December 11, 2020

EPA Administrator Andrew Wheeler is applauding West Virginia and potentially other states for beginning to submit compliance strategies for the agency's narrow Affordable Clean Energy (ACE) power plant greenhouse gas rule, arguing the move shows concrete progress on implementing the rule.

"Our [GHG] rule that we put into effect last year, we are already seeing the first implementation plans coming in from the states. I believe West Virginia's, if we don't have it this week, we will have it in the next few days," Wheeler said during a Dec. 11 virtual event hosted by the group ConservAmerica.

The administrator offered the update as part of a broader defense of the Trump administration's climate rules for vehicles, oil and gas operations and aircraft that either scuttled stronger Obama-era standards or generally embraced market-driven emissions cuts.

His defense of the ACE rule -- which is largely premised on improving coal plants' efficiency and which critics argue is unlawfully weak -- comes amid questions about how relevant states' compliance plans will be given that Biden officials are expected to develop stronger power plant GHG standards.

Some observers are suggesting that the state plans, which are being filed roughly 18 months ahead of a July 2022 submission deadline in the rule, could be intended to lay the predicate for some states to assert "reliance" interests in opposition to efforts to strengthen ***EPA***'s rules.

An early submission by West Virginia also could hold symbolic importance given that the state was the named plaintiff in litigation over the Obama-era Clean Power Plan (CPP), which ACE replaced.

Wheeler's remarks come several months after acting ***EPA*** air chief Anne Austin told an August event in Texas that the first state ACE compliance plans would be submitted "soon."

It is not clear if Trump officials intend to act on the looming West Virginia submission before the Jan. 20 end of the administration. The ACE rule gives ***EPA*** up to 18 months to act on a state plan after it is submitted, meaning that action from Biden officials might not occur quickly.

EPA did not immediately respond to a query on the exact status of West Virginia or other states' plans. 'Wanted Me To Go Further'

Regarding the Trump ***EPA***'s broader climate agenda, Wheeler reiterated prior arguments that the agency's rules are affirmative climate measures.

"There are people who wanted me to go further, but I can only go as far as [what] the law that Congress has passed . . . gives me the authority to do," Wheeler said, reiterating contested claims that the Obama ***EPA*** exceeded its regulatory authority.

Regarding ACE specifically, he said "the states are already complying with it, we are going to see GHG reductions from our rulemakings."

He also contrasted that implementation progress with the CPP that was stayed by the Supreme Court.

States have until July 8, 2022, to submit implementation strategies for ACE, meaning submissions arriving now are roughly a year and a half early.

But agency receipt of a state plan is just a step toward fully implementing the rule. ***EPA*** has six months to formally determine that a state has submitted a complete plan, and an additional 12 months to approve or disapprove that plan.

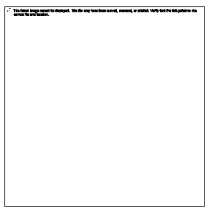
One legal observer sees the early push for state plans as part of a broader effort seeking to lock in ***EPA*** standards that require little in the way of actual GHG cuts.

EPA projected its rule would spur a reduction of only a few percentage points in power sector emissions beyond business-as-usual trends, and that it could even allow some plants to increase emissions to the extent that efficiency gains allow them to run more often.

The observer says that even if ***EPA*** does not take action on the forthcoming state plans, they could factor into legal arguments that "states are already relying on this approach" and it should therefore not be upended.

The Biden ***EPA*** is widely expected to revisit the ACE rule as part of its stated goal of reaching net-zero power sector emissions by 2035, though many observers say the agency must grapple with how to issue tough standards amid questions about whether the CPP's "beyond-the-fence" approach would pass legal muster. -- Doug Obey (dobey@iwpnews.com)

Return to Top



ECONOMISTS URGE BIDEN TO 'CORRECT' FLAWS IN TRUMP WOTUS RULE ANALYSIS

Inside EPA | 12/18/2020

Posted December 15, 2020

Environmental economists are outlining several concerns with the Trump administration's economic analysis to support its narrowed definition of waters of the United States (WOTUS), criticisms that they hope will aid the incoming Biden administration in "correcting" the rule and other Trump policies that used similar analyses.

The findings in the new report from the External Environmental Economics Advisory Committee (E-EEAC) could help the incoming Biden administration "correct structural weaknesses in this rule as well as other important ***EPA*** policies," JR DeShazo, who directs the University of California at Los Angeles' Luskin Center of Innovation and is a founding co-chair of E-EEAC, said in a Dec. 15 statement.

The independent E-EEAC was formed after ***EPA*** dissolved its Environmental Economics Advisory Committee and consists of researchers and economists who weigh in on agency regulatory policy. The eight-member panel that produced the WOTUS report was co-chaired by David A. Keiser of the University of Massachusetts Amherst and Sheila M. Olmstead of the University of Texas at Austin and Resources for the Future.

Despite the findings in the report, environmentalists and other opponents of the Trump administration's WOTUS rule defining the scope of Clean Water Act (CWA) jurisdiction might struggle to have President-elect Joe Biden quickly replace the regulation with a more expansive policy. The Biden administration's ability to make significant changes to WOTUS rule may depend on how much time and other resources are consumed by addressing climate change, in addition to challenges related to complexity of the regulation, legal experts say.

But if Biden does pursue an overhaul of CWA jurisdiction policy, the E-EEAC report outlines several alleged flaws in the Trump administration's policy that could help to justify such a change.

The report on the Trump administration's rules -- which repealed and replaced a broader Obama-era WOTUS policy -- highlights five areas where the economic analyses (EAs) for the Trump rules are flawed, starting with the rules' statements that states may be in a better position than the federal government to regulate local environmental public goods, such as water quality. The rule's assertion "is inconsistent with the best available science on hydrologic connectivity and ignores transboundary pollution," the report says. The science suggests that the affected waters are connected to downstream waters and many state borders are arbitrary with respect to hydrological features, and under these conditions, the narrowing of CWA jurisdiction will likely result in transboundary pollution, the report says.

The basic theory of efficient regulatory decentralization assumes that there is no transboundary pollution, and the empirical literature in economics suggests that in the presence of such externalities, water quality is likely to decrease, the report says. But even if water science did not contradict the arguments in the repeal and replacement analyses, conclusions from the literatures on interest group politics and competition in regulatory stringency would be additional reasons to worry about decentralization, it adds.

"Thus, in our view, the theoretical justification for decentralization in this case is weak. We recommend that in future rulemakings, ***EPA*** and the Army Corps [of Engineers] assess the potential importance of inter-state spillovers from reducing the CWA's scope, and if they are significant, correct the assertion that water quality in this context is a 'local public good.'"

A second problem with the Trump administration's approach is the prediction that many states will regulate waters newly removed from the CWA's reach because it is inconsistent with states' prior behavior, E-EEAC's interpretation of state laws and regulations and ***EPA***'s Guidelines for Economic Analysis.

EPA and the Corps argue that if some states decide to regulate waters no longer covered by the WOTUS definition, then these states will not experience changes in water quality and so they are dropped from the rule's benefit-cost analysis -- something that has a large impact on national net benefit estimates.

"The agencies' approach is very unusual; we cannot find another example in contemporary regulatory impact analysis," the report says, adding that it "is speculative to a degree that appears to violate ***EPA***'s Guidelines for Economic Analysis." States' Decisions

States' responses to the 2001 Supreme Court ruling in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, which eliminated CWA protection for isolated wetlands, show that only a few states moved to expand their own jurisdiction, suggesting it is unlikely most states will step in to fill the gap now, the report says.

The report also says E-EEAC's analysis of state laws "show that the agencies were more optimistic than the data would justify in their application" of three data that would indicate states' ability to regulate more waters. These criteria are whether states currently regulate surface waters more broadly than the CWA requires; have "broad legal limitations" on regulating beyond federal jurisdiction, and currently have a dredge-and-fill program for wetland regulation.

"Given the flaws in the agencies' predictions about the likelihood of state action, and the large effect of this subjective approach on the benefit and cost estimates, we recommend that the agencies avoid this subjective approach to predicting the likely reactions of state regulators in future rulemakings, and that stakeholders avoid interpreting any of the numbers in the 'federalism scenarios' within" the repeal rule and replacement rule's EAs, the report says.

A third concern is that the agencies' approach to environmental federalism in the repeal and replacement rules has important implications for other federal regulations, which underscores the need for guidelines for objective practice, as well as retrospective analysis, the report says.

The fact that an environmental problem such as surface water pollution has some local effects does not mean that an EA would always or even usually imply that local rather than federal regulation produces better

environmental and economic outcomes, the report says.

The potential reach of the agencies' theoretical and empirical arguments for decentralizing regulation is broad, the report says, noting that many of the major environmental statutes assert federal jurisdiction that could alternatively be decentralized to states. "As we highlight in detail in our report, there are arguments on both sides of this debate, but the theoretical and empirical approach in this particular case for decentralization is not convincing," the report says. "However if this federalism analysis is going to be applied in other regulatory settings, we recommend that the agencies seek guidance from the Office of Management and Budget, the ***EPA*** Science Advisory Board, or other institutions that provide best practices for regulatory impact analysis, to ensure that the process is carried out objectively and carefully."

Retrospective analysis, in which the agencies examine ex post the accuracy of their state behavior predictions, seems particularly important, the report adds.

The fourth problem the report highlights is that while the meta-analysis used to estimate the forgone benefits of removing wetlands from CWA protection is generally well done, its subsequent use for predicting wetland damages was less so. Therefore, the report says the approach would benefit from additional transparency and sensitivity analysis.

Specifically, the report recommends that in future rulemakings the agencies avoid assuming that the damages from wetland losses stop at state borders; that they include a wider range of revealed and stated preference studies in their models valuing wetland losses; and that they provide more transparency on the sensitivity of benefit predictions to changes in key prediction parameters.

Finally, the report says the selection of sites for the agencies' case studies does not serve the stated objectives for this portion of the EAs in terms of representativeness, scope of impacts assessed and monetized, or integration with the national benefit-cost analysis. Watershed Reviews

In addition to estimating the national benefits and costs of the 2020 WOTUS rule, the agencies also used case studies from three different watersheds comprising parts of the Ohio River Basin, the Lower Missouri River Basin, and the Rio Grande River Basin.

The report says this approach has the potential to provide more detailed benefit and cost estimates in specific locations and illustrate the full range of potential outcomes from narrowing CWA jurisdictional definitions.

"Unfortunately, the case studies did not fulfill this role, for several reasons," the report says.

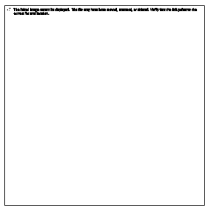
These include the fact the case studies only monetize estimates of the impacts on the wetlands regulatory program, and not the other parts of the CWA affected by the rule; the three watersheds are all in states that are strongly skewed to the bottom of the list of state net benefits in the national analysis; and the case studies ignore inter-connectedness between the affected waters and those downstream, contrary to the best available science.

"This is ironic, given that all three case-study watersheds include multiple states, highlighting the potential importance of inter-state water quality spillovers under the CWA and providing additional grounds to critique the federalism arguments made in the EAs," the report says.

As a precedent for future EAs, the agencies' theoretical arguments about the efficiency of decentralized environmental policy and the empirical application of these arguments within the 2019 repeal rule EA and the 2020 replacement WOTUS rule EA are worthy of further discussion by economists, lawyers and policymakers, the report says.

While the report says the EAs theoretical arguments for decentralization of CWA regulation is not strong, such arguments could be appropriate in other cases. "In contrast, the empirical approach of dropping states from benefit-cost calculations based on speculation about their future actions is not sound in the case of the recent WOTUS EAs, and it is unlikely to be sound in other regulatory contexts," the report says. "We hope that by highlighting these important challenges, our report will lead to a rigorous discussion of whether and how agencies should deal with these issues in future environmental regulation." -- Lara Beaven (lbeaven@iwpnews.com)

Return to Top



U.S. ASKS SUPREME COURT TO REJECT GUAM CERCLA CONTRIBUTION CHALLENGE

Inside EPA | 12/18/2020

Posted December 11, 2020

The United States wants the Supreme Court to deny a petition from the government of Guam over the scope of the Superfund law's contribution clause, arguing a Clean Water Act (CWA) settlement with Guam blocks the territory from recouping cleanup costs under its preferred section of the Superfund law.

In addition, the United States tells the high court in a Dec. 7 brief in opposition to Guam's petition for certiorari that "Contrary to petitioner's characterization . . . this is not an exceptional case in which this Court's intervention is needed to prevent a 'grossly unfair' result," noting the territory's significant contribution to waste disposed at the Ordot dump on Guam, a former U.S. Navy disposal site.

Private-practice attorneys doubt the Supreme Court will take the case, given its highly selective nature in accepting cases for review.

Gregory Wall, an attorney with Hunton Andrews Kurth after serving at ***EPA*** as a senior attorney on Superfund enforcement cases, tells Inside ***EPA*** even though the high court earlier this year ruled in a Superfund case -- Atlantic Richfield v. Christian -- despite arguments by the U.S. government against accepting that case, he doubts the high court will accept this one.

First, he says, the high court grants just 1-2 percent of certiorari petitions filed each term, and the chances for granting a review usually decreases if the U.S. government urges rejecting the petition. Further, he says in a written response, "I think the fact that the Court has previously weighed in on contribution rights in both Aviall (2004) and Atlantic Research (2007) further reduces the chance that the Court accepts this case."

Jonathan Ettinger, an attorney with Foley Hoag, says he would "not be surprised" to see the high court reject the case, given it is highly selective. "However, if it takes the case, I would not be surprised to see a reversal," he adds, alluding to the assumption that the high court could otherwise simply let the prior ruling, which favors the United States, stand by failing to act.

At issue is whether Guam is limited to pursuing a portion of its cleanup costs from the United States under the Comprehensive Environmental Response, Compensation & Liability Act's (CERCLA) contribution provision -- section 113(f)(3)(B) -- and has therefore missed its chance to recover such costs as the statute of limitations under that section ran out years ago. Contribution actions have a three-year statute of limitations for filing, triggered at the date the plaintiff reaches a settlement with the government resolving its liability for response actions.

Ettinger says the case, if accepted, could be important. "There's quite a bit of confusion over the statute of limitations in CERCLA. And a decision by the Supreme Court would help clarify things," he says.

Rather than relying on section 113(f)(3)(B), Guam is seeking to recoup cleanup costs from the Navy for part of the cleanup of the Ordot dump, which it says the Navy created and disposed of toxic waste in for decades. Guam faces cleanup costs of more than $160 million -- which it says is a staggering sum for the territory, making up one fifth its total annual budget, according to Guam's Sept. 16 petition for review.

Guam also argues if an appeals court ruling is allowed to stand, it will let the federal government off "scot-free." It contends, "That result strikes at the heart of CERCLA's central aims, is the product of an untenable reading of the relevant statutory provisions, and unjustly penalizes the people of Guam." Cost Recovery

Instead, the territory wants to use section 107 -- CERCLA's cost recovery mechanism -- to recoup those costs.

Under that section, it would not be barred by the statute of limitations because it runs for six years, triggered at the initiation of physical on-site construction of remedial action. Guam says it filed in timely fashion its suit against the United States in 2017 because extensive remediation began at the site in December 2013.

But the United States says Guam is precluded from pursuing a section 107 action, arguing its only avenue is a section 113 contribution action. The United States cites federal appeals courts, including the U.S. Court of Appeals for the District of Columbia Circuit in this case, holding that a party with the authority to seek a contribution action under section 113 cannot proceed under section 107 instead.

In this case, the D.C. Circuit ruled Feb. 14 that the 2004 consent decree Guam signed with the federal government addressing CWA claims triggered section 113(f)(3)(B), and claims by Guam thus do not meet the section's statute of limitations. The court, in line with three other circuits, ruled that section 113(f)(3)(B) does not require a CERCLA-specific settlement. The court also found that the consent decree resolved the territory's liability for a response action because it required Guam to design and put in place a "dump cover system."

Guam contends that the appeals court ruled that section 113(f)(3)(B) was triggered by the CWA settlement, "even though that decree did not mention CERCLA, explicitly disclaimed any finding of liability, and left Guam exposed to future liability."

But the U.S. disputes Guam's broad assertion that a review of the appeals court decision is necessary in order to prevent the federal government from evading its legal obligations under CERCLA. The U.S. government says that is not the case, as the dispute involves which of CERCLA's legal mechanisms are available to Guam. The appeals court agreed that the mechanism available is a contribution action, rather than a section 107(a)(4)(B) cost recovery claim, but that the petitioner failed to bring its suit in time.

"Those holdings will not insulate the United States from potential liability in future cases where settling parties assert their contribution claims in a timely manner," it adds.

Guam contends that the questions it is asking the court to resolve "are frequently recurring and tremendously important -- to both the operation of CERCLA and the legitimacy of dealing with the United States."

The petitioner asks the Supreme Court to decide "[w]hether a non-CERCLA settlement can trigger a contribution action under CERCLA section 113(f)(3)(B)," and, second, "[w]hether a settlement that expressly disclaims any liability determination and leaves the settling party exposed to future liability can trigger a contribution claim under CERCLA Section 113(f)(3)(B)." Circuit Split

In its brief, the federal government concedes that the first question is a split circuit issue, albeit "a (lopsided) circuit conflict," but contends the other is not.

On the first question, the federal government says that the D.C. Circuit in this case, along with the 3rd, 7th and 9th Circuits, have ruled that a non-CERCLA settlement "may give rise to a contribution claim under Section 113(f)(3)(B)." In contrast, the 2nd Circuit in its 2005 decision in Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc. found that that section of law "creates a right to contribution 'only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved.'"

But the United States argues that the 2nd Circuit relied on a misreading of legislative history that references section 113(f)(1), which is limited to suits under CERCLA. Further, the federal government points out that the circuit court has alluded to criticisms of that decision and has not cited it since a 2010 ruling. "Because the Second Circuit has signaled its willingness to reconsider its outlier decision, this Court should deny the petition for a writ of certiorari and allow an opportunity for the circuit conflict to resolve itself without the Court's intervention," it says.

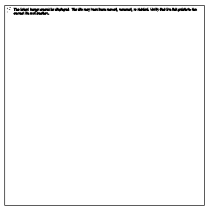
The United States also disputes the argument by the petitioner that the cleanup activities for which Guam is seeking contribution do not involve a section 113(f)(3)(B) "response action." The United States says that argument is "self-defeating."

The territory's claim for judicial relief "depends on the contention that petitioner's cleanup costs qualify as 'necessary costs of response' under CERCLA," even though it incurred the costs to satisfy the CWA suit. But the United States says, "That argument cannot be reconciled with petitioner's suggestion that the same cleanup activities do not constitute a 'response action.'"

On the second question before the court, the United States contends the issue does not warrant high court review as it deals with interpreting a consent decree, not CERCLA, and in any case the petitioner misreads two

circuit court rulings related to when a settlement does not resolve a party's liability. -- Suzanne Yohannan (syohannan@iwpnews.com)

Return to Top



BIDEN OFFICIALS SIGNAL 'HUMILITY' IN RE-ENTERING GLOBAL CLIMATE DISCUSSIONS

Inside EPA | 12/18/2020

Posted December 10, 2020

Officials with the incoming Biden administration appear to be acknowledging concerns that the United States must regain credibility on international climate matters and thus are pledging to re-engage on the issue with "humility," including by working more closely with the European Union.

John Kerry, former secretary of State for the Obama administration who was key in negotiating the Paris Agreement five years ago and will serve as President-elect Joe Biden's chief climate envoy, told NPR that he would seek to raise global ambition on climate but would do so with "humility."

"It's simple for the United States to rejoin [the Paris deal], but it's not so simple for the United States to regain its credibility," Kerry said in the Dec. 10 interview, alluding to both the Trump administration's rebuke of the landmark agreement and push to scrap multiple domestic climate policies.

Similarly, David Waskow, director of the World Resource Institute's (WRI) climate initiative, tells Inside ***EPA*** Dec. 9 that the U.S. "can't come back and assume a full-on leadership mode in the way it [did] in the lead-up to Paris. There needs to be more humility, given what's happened over the last four years."

However, he said that Biden's selection of Kerry as his top climate envoy "makes clear this administration will see [climate] as an integral part of how it goes about its foreign policy."

Biden's team will not have a formal presence at a Dec. 12 "climate ambition summit" hosted by the United Nations that coincides with the Paris Agreement's five-year anniversary. A transition team spokesman told reporters that the incoming administration respects "the principle that there is one president at a time."

The event will be co-hosted by the U.N., the United Kingdom and France, with support from Chile and Italy.

Additionally, Los Angeles Mayor Eric Garcetti (D) is slated to speak as a de facto proxy for Biden in a high-profile 90-minute speech -- with speaking slots reserved for nations that U.K. officials believe are taking sufficient steps on climate -- though Garcetti is officially representing the C40 coalition of mayors, according to a Dec. 8 report in Politico. EU Leadership

During the Trump era, the international climate leadership vacuum has largely been filled by the EU, which is signaling it does not want to relinquish this role to the U.S., given both Trump's rejection of Paris, as well as the spurning of the Kyoto Protocol by then-President George W. Bush.

"When the transatlantic partnership is strong, the EU and the US are both stronger. It is time to reconnect with a new agenda," said a Dec. 2 statement from Ursula von der Leyen, president of the European Commission, which is the EU's executive branch.

The statement sought to establish a transatlantic green agenda that builds upon Europe's aggressive climate

policies over the last five years.

She said Europe will be "at the forefront of brokering ambitious commitments. The U.S. is also well placed to support us," according to a Dec. 7 report in Axios.

Analysts at ClearView Energy Partners in a Dec. 7 report note that while Kerry intends to reassert U.S. climate leadership, "Brussels may not be eager to relinquish what it perceives as its leadership role on climate (and other topics) to the U.S. just yet. To the contrary, we would once again suggest that an increasingly assertive Europe may be trying to set the terms of future climate cooperation on multiple fronts."

As much as Biden and von der Leyen "have declared their intentions to cooperate, bridging the trans-Atlantic divide on climate policy could prove as difficult here as it might on trade matters," they add, noting that the EU last month imposed retaliatory tariffs on the U.S. in a long-running dispute between Airbus and Boeing. "The most salutary explanation we could offer was that Brussels wanted to make sure that an inwardly focused Washington did not ignore the relationship. That said, one might also see the tariffs, the recent climate policy rollout and the markers laid down by the Agenda for Global Change as a bid to acquire negotiating leverage."
'Own House In Order'

Meanwhile, WRI's Waskow says that the most important action the U.S. needs to take to regain credibility on international climate matters is to "get its own house in order," including by crafting ambitious domestic policy in order to submit a strong nationally determined contribution (NDC) under the Paris deal ahead of the next U.N. climate meeting slated for November 2021 in Glasgow, Scotland.

"What the U.S. does is critical," he says, flagging a September analysis from the group America's Pledge, which found that states' GHG actions fall short of the Obama administration's Paris goals but nonetheless had made significant progress in the absence of federal leadership.

Waskow notes that the report shows expanded action by U.S. states, cities and businesses can reduce GHGs up to 37 percent by 2030 compared to 2005 levels, and the reductions can increase to 49 percent if the federal government re-engages. The Obama administration's NDC pledged a 26 to 28 percent cut by 2025 from the same baseline.

The America's Pledge findings helped prompt WRI last month to float an ambitious 2030 GHG target for the U.S. NDC, to achieve a 45 to 50 percent GHG cut from 2005 levels in 2030.

After offering an ambitious domestic target, Waskow says the Biden administration should begin "really engaging internationally . . . in a clear, constructive way."

If officials strike the right diplomatic tone, then Waskow sees many opportunities for the U.S. to step up, noting that Biden has said he wants to hold a major leaders' climate summit early in his administration, which could signal an "initial thrust." Climate is also expected to be a major issue at the 2021 G7 and G20 meetings, so there will be "other opportunities to engage with leaders on the climate front," he notes.

A lot of work must also occur in bilateral and multi-lateral relationships with China at the forefront, Waskow says. A 2014 agreement on GHG targets between the Obama administration and Chinese President Xi Jinping was seen as a key breakthrough ahead of the Paris deal, which for the first time included GHG mitigation commitments by nearly all countries in the world, rather than only "developed" countries.

"Again, we can't expect things to return exactly the way in which they were before the Trump administration, and I think things have shifted in terms of how people see the dynamics between the U.S. and China more broadly. Things that can and need to happen have to move forward in some coordinated ways because [the U.S. and China] are the two largest emitters and there is an absolute need for them to work in a way that does move in the right direction, even if they are not on stage together as we thought ahead of Paris," Waskow said.

Also critical will be the U.S. relationship with the EU, as well as major developing countries India and Indonesia, he adds.

Another area that is crucial for the U.S. to engage in is finance, which is something other countries are going to look to as a signal. There is traditional public financial assistance for poorer countries' climate work, with the Green Climate Fund (GCF) at the core, as well as potentially realigning multilateral development banks and other finance mechanisms to be in step with the Paris goals.

The Obama administration committed $3 billion to the GCF over four years but only contributed $1 billion before it left office, so a $2 billion gap remains that the Trump administration did not honor. The U.S. will be under

pressure to provide that and then pledge more, Waskow notes.

This money pays off in the long run, he argues, because it reduces humanitarian costs for populations that are hit by climate-induced water scarcity and storms. -- Dawn Reeves (dreeves@iwpnews.com)

Return to Top